



**THE PRESENTATION OF THE BILL OF LADING, A NECESSARY  
EVIL: AN EXAMINATION OF THE LEGAL IMPLICATIONS OF THE  
MISDELIVERY OF CARGO, OWING TO THE NON-PRESENTATION  
OF THE BILL OF LADING, ON THE RIGHTS AND DUTIES OF  
CARRIERS AND INDORSEES UNDER SOUTH AFRICAN AND  
ENGLISH LAW, AND THE HAGUE-VISBY RULES.**

by

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## **DEDICATION**

This dissertation is dedicated to Jehovah for providing me with the necessary strength and perseverance to complete this dissertation and for blessing me with a partner without whose incredible amount of patience, love and support I would never have managed to reach this milestone.

## **ACKNOWLEDGEMENT**

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## ***ABSTRACT***

The transferable nature and function as a document of title allow for bills of lading to be transferred from one consignee to another and for its use as security. The transferring of the bill of lading down a chain of buyers often results in the bill not reaching the final consignee in time to collect the cargo at the port of discharge. The late arrival of bills of lading coupled with the traditional requirement of presentation thereof to obtain delivery of the cargo causes significant practical problems for carriers. In response to these practical problems, carriers have implemented practices to circumvent the presentation rule, such as delivering the cargo without the production of the bill of lading or delivering against a letter of indemnity. These practices have become quite common amongst carriers notwithstanding the possible legal consequences. A carrier that misdelivers the cargo owing to the non-production of the bill of lading will be in breach of its contractual duties and this will affect its rights to rely on the limitations and immunities provided for in the contract of carriage.

This study aims to determine whether the presentation rule is a necessary evil and to examine the legal implications on the rights and duties of carriers and endorsees of the misdelivery of cargo owing to the non-presentation of the bill of lading. To determine the necessity of the presentation rule, the effect of the misdelivery of cargo owing to the non-production of the bill of lading on a carrier and endorsee's rights and duties are considered in the context of the provisions in The Hague-Visby Rules. The enforceability of letters of indemnity under South African and English law is examined. Likewise, the relevant South African and English legislation is examined to determine a bank's right as the holder of the bill of lading to institute an action against a carrier for the misdelivery of cargo. The effect of an electronic alternative on the presentation rule is also considered. This study was conducted through a literature review which included an analysis and review of legal sources such as legislative provisions, court judgments and academic opinions on the subject. This study concludes that notwithstanding the practical difficulties caused by the presentation rule, it is a well-established admiralty practice that serves a valuable purpose and should be adhered to as far as possible. The use of letters of indemnity to remedy the practical problems caused by the presentation rule is not a viable solution and a more modern and long term solution is needed. One such solution may be the implementation of electronic alternatives such as blockchain technology. However, in order to realise the use of blockchain technology the necessary legal reforms need to first take place.

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*‘Unfortunately for the shipowner [the bill of lading] rather like the White Rabbit in Alice in Wonderland, is often late and sometimes never makes it to the party at all.’<sup>1</sup>*

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<sup>1</sup> GARD ‘The missing bill of lading’ 1998, available at <http://www.gard.no/web/updates/content/52588/the-missing-bill-of-lading>, accessed on 8 March 2019.

# CHAPTER 1

## INTRODUCTION

### 1.1 Background

The International Chamber of Shipping states that 90% of international trade takes place through the carriage of goods by sea.<sup>1</sup> Accordingly, the success and growth of economies around the world depend heavily on the importing and exporting of bulk raw and refined materials by way of sea transport.<sup>2</sup>

International trade entails different procedures and documentation. There are also many different parties involved, including buyers, sellers, banks, and carriers.<sup>3</sup> An exporter/seller and a carrier will enter into a contract of carriage to transport the goods from the port of loading to the port of discharge. The contract of carriage is evidenced by a sea transport document such as a bill of lading. Once the carrier has received the goods and they are loaded on board the vessel, a bill of lading is issued to the shipper.<sup>4</sup> The shipper, in turn, dispatches the bill of lading to the named consignee or lodges it with a bank as security for a letter of credit.<sup>5</sup> In the former case, the consignee then presents the bill of lading to the carrier at the port of discharge in order to obtain delivery of the goods.<sup>6</sup>

The bill of lading is one of the principal documents issued in connection with a contract of carriage.<sup>7</sup> One of the purposes of the modern bill of lading is to allow for the further trade of cargo that is still in transit<sup>8</sup> since sea voyages tend to be slower than other modes of transport.<sup>9</sup> In any event, the bill of lading functions in three ways.<sup>10</sup> It first acts as a receipt for

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<sup>1</sup> *International Chamber of Shipping* 'Shipping and World Trade', available at <http://www.ics-shipping.org/shippingfacts/shipping-and-world-trade>, accessed on 10 April 2019.

<sup>2</sup> *Ibid.*

<sup>3</sup> An international transaction may include up to 50 different parties as pointed out by M Dubovec 'The problems and possibilities for using electronic bills of lading as collateral' (2006) 23(2) *AJICL* 438.

<sup>4</sup> *UNCTAD* 'Bills of Lading', available at [https://unctad.org/en/PublicationsLibrary/c4isl6rev1\\_en.pdf](https://unctad.org/en/PublicationsLibrary/c4isl6rev1_en.pdf), accessed on 10 April 2019.

<sup>5</sup> *Ibid.*

<sup>6</sup> The outline of the sequence of the life of the bill of lading provided in this introduction is an abbreviated version and there are many other factors which may come into play. This will be discussed in more depth in the chapters to follow.

<sup>7</sup> G Treitel, FMB Reynolds, TG Carver *Carver on Bills of Lading* 3 ed (2011) 1.

<sup>8</sup> *UNCTAD* op cit note 4.

<sup>9</sup> JF Wilson *Carriage of Goods by Sea* 7 ed (1988) 132.

<sup>10</sup> J Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed (1999) 688.

the goods shipped or received for shipment by the carrier. Secondly, it may be used as evidence of the contract of carriage. Thirdly, it may serve as a document of title.<sup>11</sup>

The function of the bill of lading as a document of title gives the lawful holder of the bill the right to receive, hold and dispose of the document and the goods it covers.<sup>12</sup> The most important of these rights is that it gives the holder the right to claim delivery of the goods from the carrier once the document is presented.<sup>13</sup>

There are two different forms of bills of lading, the one being the order bill and the other a straight bill. The order bill of lading is a transferable document of title since it is made out 'to order'<sup>14</sup> or 'to X or assigns' and it can be transferred through an endorsement to other parties.<sup>15</sup> The straight bill of lading, however, is a non-transferable document. It is made out to a named consignee. The shipper can transfer title in the goods to the consignee by delivering the bill of lading to him. However, the consignee cannot transfer the property in the goods by delivering the bill to a third party.<sup>16</sup> The straight bill of lading<sup>17</sup> and the order bill of lading are both documents of title. Consequently, a straight or order bill has to be presented<sup>18</sup> to the carrier at the port of discharge in order to obtain delivery of the goods.

In terms of article 1(b) of The Hague-Visby Rules, the said Rules<sup>19</sup> apply to 'all contracts of carriage covered by a bill of lading or any similar document of title'. The Hague-Visby Rules are an international set of rules that regulate the terms of bills of lading<sup>20</sup> and the rights and duties of the carrier and endorsees.<sup>21</sup> Whilst South Africa is not a signatory to The Hague-Visby Rules, it has given effect to it through the South African Carriage of Goods by Sea Act

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<sup>11</sup> J Hare op cit note 10 at 691.

<sup>12</sup> Č Pejović 'Documents of Title in Carriage of Goods by Sea under English Law: Legal Nature and Possible Future Directions' 1996 *PPP god* 158.

<sup>13</sup> JF Wilson op cit note 9 at 154.

<sup>14</sup> By insertion of the word 'order', the bill is given the legal and commercially important characteristic of becoming a transferable document of title as pointed out by C Proctor *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document in Financing International Sale Contracts* (unpublished LLM dissertation, the University of South Africa, 1996) 68.

<sup>15</sup> R Aikens, R Lord & M Bools *Bills of Lading* 2 ed (2015) 128.

<sup>16</sup> JF Wilson op cit note 9 at 161.

<sup>17</sup> The straight bill of lading did not always enjoy the status of a document of title since it was argued that it was not transferable. However, the court in *JI MacWilliam Co Inc. v Mediterranean Shipping Co S.A.* [2005] (Rafaela S) APP.L.R. 02/16 held that the straight bill of lading is a document of title.

<sup>18</sup> For the purposes of this research paper, when reference is made to the presentation of the bill of lading it is the original bill of lading that has to be presented.

<sup>19</sup> The Hague Rules as amended by the Brussels Protocol (The 'Hague-Visby Rules') 1968.

<sup>20</sup> F Reynolds 'The Hague Rules, The Hague-Visby Rules, and the Hamburg Rules' (1990) 7 *MLAANZ Journal* 16.

<sup>21</sup> The Hague Rules as amended by the Brussels Protocol (The 'Hague-Visby Rules') 1968.

1 of 1986. The Hague-Visby Rules are accordingly applicable to all outbound shipments from a South African port.<sup>22</sup>

The advantages of using a transferable bill of lading are evident, especially if there is a possibility of the goods being sold whilst it is still at sea. It is also advantageous when documentary security is required by a party to a contract of sale.<sup>23</sup> However, the transferability of the bill of lading and its use as documentary security can result in the bill being transferred along a chain of buyers. Consequently, there is an increased risk of the physical bill not reaching the final consignee before the goods arrive at the port of destination.<sup>24</sup> The late arrival of the bill of lading can have dire financial and legal implications for both carriers and endorsees.

In light of the practical difficulties caused by the transferable nature of the bill of lading and its function as a document of title, a practice has evolved amongst carriers to deliver the cargo (especially bulk cargo) without insisting on the presentation of the bill of lading or to deliver against a letter of indemnity. This practice has resulted in several claims this year alone, by banks against carriers for misdelivered cargo.<sup>25</sup>

## *1.2 Aim and objective of this study*

The frequent misdelivery of cargo and subsequent claims for damages underlines the need for carriers and endorsees to understand and appreciate the risks associated with the delivery of the cargo without the presentation of the bill. The purpose of this study is to determine whether the need to present a bill of lading is a necessary evil in view of the legal implications of the misdelivery of cargo, owing to the non-presentation of the bill of lading, on the rights and duties of carriers and endorsees. The legal implications of the non-adherence of the presentation rule will be examined under four sub-research questions.

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<sup>22</sup> J Hare op cit note 10 at 648.

<sup>23</sup> UNCTAD 'The Use of Transport Documents in International Trade' supra accessed on 10 April 2019.

<sup>24</sup> The Law Commission notes that a 'bill of lading can take a year or even longer to reach the ultimate holder' in R Williams 'Letters of Indemnity' (2009) 15(5) *JIML* 396.

<sup>25</sup> GARD 'Misdelivery of coal shipments in India' 15 February 2019, available at <http://www.gard.no/web/updates/content/27118832/misdelivery-of-coal-shipments-in-india>, accessed on 10 April 2019.

### *1.3 Research questions*

#### *1.3.1 Sub-research question No. 1:*

An examination of the relevant provisions of The Hague-Visby Rules in respect of:

1. determining its applicability to claims resulting from the misdelivery of cargo;
2. whether the one-year time bar created by The Hague-Visby Rules applies to claims where the carrier has delivered the cargo to a third party without production of the original bill of lading; and
3. whether carriers can rely on the ‘package limitation’ if found liable for damages as a result of the misdelivery of cargo owing to the non-presentation of the original bill of lading.

#### *1.3.2 Sub-research question No. 2:*

The carrier’s risk when delivering cargo against the presentation of a letter of indemnity (‘LOI’) will be examined by analysing recent South African and English judicial decisions to determine whether the South African and English courts will enforce the terms of an LOI that indemnifies a carrier against a claim for misdelivered cargo.

#### *1.3.3 Sub-research question No. 3:*

The relevant provisions of the STDA and the UK COGSA will be examined to determine whether a financing bank as an endorsee is considered to be the rightful holder of an original bill of lading and has the title to sue the carrier for damages resulting from the misdelivery of cargo.

#### *1.3.4 Sub-research question No. 4:*

The electronic bill of lading will briefly be examined to determine its ability to replicate the paper bill of lading’s function as a document of title and how this will affect the traditional presentation rule.

#### *1.4 Scope and limitations of the study*

The scope of this dissertation will be limited to considering the carriage of goods by sea to or from a South African port covered by a bill of lading. Furthermore, this dissertation is limited to the situation where the shipowner is the carrier of the goods and there are no charterers or agents involved.

The research questions dealt with in this dissertation are centred on the bill of lading. More specifically, the ocean bill of lading and the legal consequences arising from its transferability. Thus, only the order bill of lading will be considered and not the straight bill of lading.

Any reference made to the misdelivery of cargo denotes the situation where a carrier relinquishes the cargo to a person not entitled thereto at the port of discharge and subsequently denying the holder of the bill of lading possession of the goods.<sup>26</sup> The misdelivery of cargo can either occur where the carrier delivers cargo without the presentation of the original bill of lading or where a fraudulent bill of lading is presented. This study is limited to a consideration of the legal consequences of a carrier electing to deliver cargo without the consignee presenting the original bill.

It is beyond the scope of this study to undertake a comprehensive examination of the electronic bill of lading and its ability to function as a receipt and evidence of the contract of carriage. Therefore, the examination of the electronic bill of lading is limited to its ability to function as a transferable document of title.

There are certain limitations to this study especially since the South African legislation regulating sea transport documents, such as the bill of lading is relatively new, and there is a paucity of judicial interpretation and academic opinion on the provisions of the Sea Transport Document Act 65 of 2000 ('STDA'). The English Carriage of Goods by Sea Act 1971 ('UK COGSA') is considered to be an 'appropriate counterpoint' to the STDA.<sup>27</sup> Therefore, English law, judicial decisions and academic opinion will be considered to supplement the lack of South African law on the subject matter.

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<sup>26</sup> R Aikens, R Lord & M Bools op cit note 15 at 256.

<sup>27</sup> DL Donnelly *An Examination of the Application of the Sea Transport Documents Act 65 of 2000 to Title to Sue under Contracts of Carriage Evidenced by Sea Waybills and Straight Bills of Lading* (unpublished LLM dissertation, University of KwaZulu-Natal, (2013) 9.

Whilst the United Kingdom ('UK') has adopted The Hague-Visby Rules through the UK COGSA, the UK COGSA varies in some respects from its South African counterpart and it will only be considered insofar as it does not conflict with South African legislation.<sup>28</sup>

### 1.5 *Terms of reference*

Throughout this dissertation reference will be made to the terms, bill of lading, carrier, shipper/consignor, consignee, document of title and electronic bill of lading.

According to Aikens<sup>29</sup> the term 'bill of lading' is easier to recognise than to define. It is a document<sup>30</sup> that has developed from ancient times as a 'product of mercantile convenience' and today is recognised by the courts as a document of high legal standing.<sup>31</sup> Neither The Hague Rules nor The Hague-Visby Rules attempt to define the bill of lading. However, article 1 of the Hamburg Rules<sup>32</sup> defines the bill of lading as follows:

'A document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking'<sup>33</sup>

For the purpose of this dissertation, the term bill of lading denotes a traditional paper bill. Furthermore, when reference is made to the presentation of the bill of lading, it is the original bill that has to be presented.

The term 'carrier' is described as the 'party who contracts to carry the goods'.<sup>34</sup> For the purpose of this dissertation when reference is made to the carrier, it is the shipowner.

The 'shipper', also known as the consignor, 'presents' the goods to the carrier<sup>35</sup> to transport it from the loading port to the port of discharge. According to Aikens, the shipper is defined as the original contracting party.<sup>36</sup>

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<sup>28</sup> C Proctor op cit note 14 at 41.

<sup>29</sup> R Aikens, R Lord & M Bools op cit note 15 at 120.

<sup>30</sup> Ibid.

<sup>31</sup> J Hare op cit note 10 at 688.

<sup>32</sup> United Nations Convention on the Carriage of Goods by Sea (The 'Hamburg Rules') 1978.

<sup>33</sup> Ibid.

<sup>34</sup> R Aikens, R Lord & M Bools op cit note 15 at 194.

<sup>35</sup> WP Bennett *The History and Present Position of the Bill of Lading as a Document of Title* (1914) 5.

<sup>36</sup> R Aikens, R Lord & M Bools op cit note 15 at footnote 170, 159.



A consignee's particulars may be recorded on the bill of lading or, if the bill is made out to order, the consignee's details will be left open.<sup>37</sup> Once the consignee becomes the rightful holder of the bill of lading, then only is it considered to be a party to the contract embodied in the bill of lading.<sup>38</sup>

A 'document of title' is described as an intangible document,<sup>39</sup> and the ocean bill of lading is the only document of title to goods recognised under common law.<sup>40</sup>

According to Hare the 'electronic bill of lading' can be referred to as 'the replacement of the [paper] bill of lading with an electronic alternative'.<sup>41</sup> Whilst there is no accepted definition of an electronic bill of lading, it is generally described as 'an electronic record which aims to have the functional equivalence of an original paper [bill of lading]'.<sup>42</sup>

There are three different types of 'maritime letters of indemnity'. For example, letters of indemnity for the change of destination, the omission of cargo defects on the bill of lading and the non-presentation of bills of lading.<sup>43</sup> This dissertation is only concerned with the last type of letter of indemnity. Therefore, when reference is made to letters of indemnity, it denotes the non-production of bills of lading.

## 1.6 Structure of dissertation

This dissertation consists of seven chapters and is outlined as follows:

### Chapter 1 – Introduction

The first chapter will *inter alia* include a background to the research topic, an explanation of the terminology used in the dissertation, the limitations, rationale and purpose of the research.

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<sup>37</sup> R Aikens, R Lord & M Bools op cit note 15 at footnote 170, 572.

<sup>38</sup> Ibid. The consignee may however be a party in the instance where the shipper is contracting as agent for the consignee.

<sup>39</sup> There are two types of intangible document, namely a 'document of title to money' and 'documents of title to goods' as stated by N Curwen 'The Bill of Lading as a Document of Title at Common Law', available at [http://ssudl.solent.ac.uk/66/1/2007\\_140-163.pdf](http://ssudl.solent.ac.uk/66/1/2007_140-163.pdf), accessed on 5 May 2019.

<sup>40</sup> R Aikens, R Lord & M Bools op cit note 15 at 276.

<sup>41</sup> J Hare op cit note 10 at 724.

<sup>42</sup> S Tricks, R Parson 'The legal status of the electronic bill of lading – A report for the ICC Banking Commission' 2018, available at [https://www.clydeco.com/uploads/Files/The\\_Legal\\_Status\\_of\\_E-bills\\_of\\_Lading\\_-\\_ICC\\_and\\_Clyde\\_Co.pdf](https://www.clydeco.com/uploads/Files/The_Legal_Status_of_E-bills_of_Lading_-_ICC_and_Clyde_Co.pdf), accessed on 2 June 2019.

<sup>43</sup> JR Wereley 'Third Party Enforcement of Letters of Indemnity for non-presentation of bills of lading analysis and comment' (2012) 18(5) *JIML* 339. A letter of indemnity may also be issued in order to permit the issuing of a duplicate set of documents when the originals are lost or mislaid in transit: A Mitchellhill *Bills of Lading: Law and Practice* 2 ed (1990) 61.

## *Chapter 2*

The pitfalls of the presentation rule stem from the third function of the bill of lading. Therefore, chapter 2 will commence with an examination of the concept of the document of title and give a brief overview of how the bill of lading acquired this function. Thereafter the function of the presentation rule will be discussed as well as the legal consequences of non-compliance therewith.

## *Chapter 3*

The third chapter will include an examination of the relevant provisions of The Hague-Visby Rules in order to determine its applicability to claims for misdelivered cargo and the relevant consequences flowing therefrom. Various judicial decisions and academic opinions relating to the issue of applicability will be discussed in this chapter.

## *Chapter 4*

In chapter 4 an analysis will be conducted of recent South African and English judicial decisions to highlight the risk of a carrier delivering cargo against a letter of indemnity; and moreover, to determine whether the South African and English courts will enforce the terms of a letter of indemnity.

## *Chapter 5*

Chapter 5 will entail an examination of the ability of the electronic bill of lading to function as a transferable document of title. This chapter will also consider how the employment of the electronic bill of lading will affect the presentation rule. The examinations will be done through a consideration of various academic opinions.

## *Chapter 6*

Chapter 6 will entail an examination of the relevant provisions of the STDA and the UK COGSA in order to determine whether a financing bank as an endorsee is considered to be the rightful holder of an original bill of lading and has the title to sue the carrier for damages resulting from the misdelivery of cargo. An examination of recent South African and English judicial decisions will also be undertaken.

## *Chapter 7 – Conclusion*

Chapter 7 will provide a summary of the findings, give recommendations (if any) and the final conclusion.

## CHAPTER 2

### THE UNDERLYING PRINCIPLES OF THE PRESENTATION RULE

#### 2.1 Introduction

The bill of lading as mentioned in chapter 1, performs an important function in the international trade of goods by sea. Originally the bill of lading merely acted as a non-transferable receipt<sup>1</sup> for the goods shipped on board the vessel. As mercantile customs developed so did the bill of lading and the use thereof.<sup>2</sup> Merchants, through necessity and convenience, began to incorporate the terms of carriage in the bill of lading.<sup>3</sup> Consequently, this elevated the bill of lading to a document of title and the possession thereof was considered to be the equivalent to being in possession of the goods.<sup>4</sup>

The acceptance of the bill of lading as a symbolic representation of the goods has various legal consequences. One of these is that the *bona fide* holder of the bill of lading has the right to demand delivery of the cargo from the carrier. The right of the consignee is nevertheless subject to a well-established rule in maritime law that the carrier can only deliver the goods to the consignee on the presentation of the bill of lading.<sup>5</sup>

In order to examine the requirements and legal consequence of the presentation rule, it is essential to first examine the underlying principles that give rise to it. This chapter will first examine the term ‘document of title’ and the recognition of it by law and general custom. Thereafter, the history of the bill of lading will briefly be outlined to establish how the bill developed from a receipt to a document of title. This chapter will also outline the three main legal consequences of the bill of lading as a document of title.

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<sup>1</sup> The receipt indicates the nature, quantity and quality of the goods shipped and can be used as proof in instances where cargo is damaged or lost whilst at sea: JF Wilson *Carriage of Goods by Sea* 7 ed (1988) 115.

<sup>2</sup> WP Bennett *The history and present position of the bill of lading as a document of title to goods* (1914) 16.

<sup>3</sup> JF Wilson op cit note 1 at 115.

<sup>4</sup> I Carr, P Stone *International Trade Law* 6 ed (1995) 170. The bill of lading is considered to be ‘a symbol of property in [the] goods’. See WP Bennett op cit note 2 at 16.

<sup>5</sup> Č Pejović ‘Legal issues arising from delivery of goods without a bill of lading: case study of some Asian jurisdictions’ 2006 *PPP* god 1.

The consideration of the nature of the bill of lading as a document of title will lay the foundation for the examination of the function of the presentation rule in the last section of this chapter.

## 2.2 *The concept of 'document of title' to goods*<sup>6</sup>

### 2.2.1 *The meaning of 'document of title' within the context of the bill of lading*

Some legal authors maintain that the term 'document of title' is inaccurate,<sup>7</sup> and they suggest different terms of reference, namely 'control document', 'document of possession'<sup>8</sup> and 'document with which title may be passed'.<sup>9</sup>

The term document of title is said to refer to a document that a carrier or warehouseman acting as a bailee issues on receipt of the goods.<sup>10</sup> There is no definitive definition of the term document of title at common law.<sup>11</sup> Various attempts have been made to define a document of title to goods. One such attempt which is described as 'sensible'<sup>12</sup> is as follows:

'... [I]t is [a] document relating to goods the transfer of which operates as a transfer of the constructive possession of the goods, and may operate as a transfer of the property in them.'<sup>13</sup>

The above definition is not considered to be all-encompassing as it lacks one of the key characteristics of a document of title, namely that a *bona fide* holder of the document has a right to demand delivery of the goods from the carrier at the port of destination.<sup>14</sup>

### 2.2.2 *The recognition of a document as a document of title*

A document of title can only develop through general custom or be recognised as such by statute.<sup>15</sup> A statute recognises a document as a document of title when it includes it in a list of documents it considers to be documents of title or if the document belongs to a 'class of documents' described in the said piece of legislation.<sup>16</sup> A document of title was first recognised

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<sup>6</sup> 'Many people – even lawyers – have only the haziest notion of the function of a document of title to goods' as stated by SF Du Toit: 'Of Straight Bills of Lading and Documents of Title' (2005) 4 *J.S.Afr.L.* 871 – 872.

<sup>7</sup> SF Du Toit op cit note 6 at 872.

<sup>8</sup> SF Du Toit *The Bill of Lading in South Africa* (unpublished thesis, University of Johannesburg, 2000) 92.

<sup>9</sup> J Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed (1999) 698.

<sup>10</sup> Č Pejović op cit note 5 at 45.

<sup>11</sup> GH Treitel et al *Carver on Bills of Lading* 3ed (2011) 323.

<sup>12</sup> SF Du Toit op cit note 6 at 875.

<sup>13</sup> Ibid; GH Treitel et al op cit note 11 at 323.

<sup>14</sup> This is considered to be one of the core common law characteristics of a document of title and no definition will be complete without making reference thereto: SF Du Toit op cit note 6 at 875.

<sup>15</sup> GH Treitel et al op cit note 11 at 327.

<sup>16</sup> Ibid.

in English law in the Factors Act 1889 (section 1(4)):<sup>17</sup>

‘The expression “document of title” shall include any bill of lading . . . any other document used in the ordinary course of business as proof of the possession or control of goods, or as authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.’

The Factors Act has since been repealed and the above definition was adopted in the Sale of Goods Act 1979.<sup>18</sup>

Section 1(4) of the English COGSA 1971 and article 1(b) of The Hague-Visby Rules<sup>19</sup> (an appendix to the Act) make reference to a ‘bill of lading or similar document of title’. Both the English COGSA and The Hague-Visby Rules apply only to the carriage of goods by sea evidenced by a bill of lading or similar document of title. According to Aikens, the referral to ‘or similar document of title’ reinforces the status of a bill of lading as a document of title.<sup>20</sup>

The South African Carriage of Goods by Sea Act (‘SA COGSA’)<sup>21</sup> does not refer to a ‘bill of lading or similar document of title’ and merely states in section 1(1)(b) that the Act will apply to ‘any bill of lading if the contract contained in or evidenced by it expressly provides that the Rules shall govern the contract’. However, The Hague-Visby Rules are likewise attached to the Act as a schedule. Therefore, the SA COGSA in giving effect to The Hague-Visby Rules, recognises the bill of lading as a document of title.

The Sea Transport Document Act<sup>22</sup> (‘STDA’) does not directly refer to the bill of lading as a document of title. Instead, in section 2(2) it states that the Act applies to sea transport documents that are ‘transferable’ and ‘negotiable’. The reference to transferable and negotiable documents instead of documents of title stems from the fact that the STDA was promulgated mainly to deal with the issue of a holder of a sea transport document’s title to sue should a dispute arise in respect of the contract of carriage.<sup>23</sup>

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<sup>17</sup> Factors Act 1889.

<sup>18</sup> In s 61(1) as read at R Aikens, R Lord & M Bools *Bills of Lading* 2 ed (2015) 140. The Sale of Goods Act has since been replaced by the Consumer Rights Act 2015 which seems not to adopt the definition of the document of title.

<sup>19</sup> The Hague Rules as amended by the Brussels Protocol (The ‘Hague-Visby Rules’) 1968.

<sup>20</sup> R Aikens, R Lord & M Bools op cit note 18 at 141.

<sup>21</sup> Act 1 of 1986.

<sup>22</sup> Act 65 of 2000.

<sup>23</sup> DL Donnelly *An Examination of the Application of the Sea Transport Documents Act 65 of 2000 to Title to Sue under Contracts of Carriage Evidenced by Sea Waybills and Straight Bills of Lading* (unpublished LLM dissertation, University of KwaZulu-Natal, 2013) 4.

To be recognised by general custom, the document used by traders has to function in three ways.<sup>24</sup> First, it has to be transferable; secondly, it must enable its lawful holder to obtain physical delivery of the goods by producing the document; and thirdly the lawful holder has to be able to dispose of the goods by transferring the document.<sup>25</sup>

The history of the bill of lading will briefly be outlined in paragraph 2.3 to establish how the bill developed from a receipt to a document of title.

### 2.3 *A brief historical background to the development of the third function of the bill of lading*<sup>26</sup>

The third function of the bill of lading that of being a document of title, was the last to develop.<sup>27</sup> Whilst it is not clear how the bill of lading came to represent the holder's entitlement to the delivery of the goods, the bill of lading's use as a document of title in England dates back to the 18th century.<sup>28</sup> Furthermore, the bill of lading was recognised as a document of title by a South African court in 1875.<sup>29</sup>

According to Du Toit,<sup>30</sup> it was during the 16th century that the first possible evidence of a basic form of endorsement of a bill of lading was discovered in a collection<sup>31</sup> of decisions of a judicial court in Genoa. Aikens argues that the transferability of the bill of lading came about during the second quarter of the 16th century.<sup>32</sup> This assertion is based on a study of libel cases<sup>33</sup> in the High Court of Admiralty during the 16th century which indicate that the bill of lading was in some way transferrable.<sup>34</sup> The libel cases revealed that there were two kinds of transferability provided for during that era, namely:

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<sup>24</sup> Č Pejović op cit note 5 at 44.

<sup>25</sup> Ibid.

<sup>26</sup> The history of the bill of lading's functions as a receipt and evidence to the contract of carriage is not germane to this paper and therefore will not be considered.

<sup>27</sup> SF Du Toit 'The evolution of the bill of lading' (2005) 11 *Fundamina* 17.

<sup>28</sup> WP Bennett op cit note 2 at 16.

<sup>29</sup> De Villiers CJ in *London and South African Bank v Donald Currie & Co* (1875) 5 Buch 29 [33-34] found that '... by endorsing the bill of lading in favour of the plaintiff, the shippers indicated him as the one for whom the goods were to be carried; as the one, therefore, who should have the right of dealing with the property and demanding possession from the captain'.

<sup>30</sup> SF Du Toit op cit note 27 at 19.

<sup>31</sup> The collection is published in the '*Decisiones Rotae Genuae*' as read at SF Du Toit op cit note 27 at 19.

<sup>32</sup> R Aikens, R Lord & M Bools op cit note 18 at 99.

<sup>33</sup> Libels are defined as 'a written statement in which a plaintiff in certain courts sets forth the cause of action or the relief sought' as read at Mariam Webster 'Definition of libel', available at <https://www.merriam-webster.com/dictionary/libel>, accessed on 20 July 2019.

<sup>34</sup> R Aikens, R Lord & M Bools op cit note 18 at 99.

‘[D]elivery to the shipper (or his agent) or their assign; or delivery to a third person (the purchaser of the goods) or his assigns.’<sup>35</sup>

It is argued that the bill of lading’s function progressed from a receipt to a document of ‘some transferability’<sup>36</sup> on account of a change in trading practices.<sup>37</sup> Merchants no longer elected to travel with their goods and instead forwarded them to a consignee.<sup>38</sup> Consequently, merchants had to furnish the consignee with a ‘document of entitlement’<sup>39</sup> to enable the consignee to claim the cargo from the carrier.<sup>40</sup> Generally, this was required when the goods were dispatched before the shipper knew who the consignee was.<sup>41</sup> The buyer needed to be able to display the document to the carrier, as his name would not be recorded on the bill or in the ship’s register.<sup>42</sup> There was also a need for a document that could be transferred by the shipper should an opportunity to trade<sup>43</sup> arise whilst the goods were at sea.<sup>44</sup>

### 2.3.1 *The transfer of ownership of the goods*

The ‘modern bill of lading’ made its breakthrough at the end of the 18th century in *Lickbarrow v Mason* (1787) 2 TR 63, 100 ER 35 (*‘Lickbarrow v Mason’*).<sup>45</sup> The King’s Bench Division had to consider the nature of an order bill of lading and more specifically its ability to transfer ownership of goods and the title of the holder of the bill of lading.<sup>46</sup>

The action was one in trover<sup>47</sup> brought by Lickbarrow (the plaintiff), for a cargo of corn (the cargo), shipped by Turing & Son, from Zealand to Liverpool on board the *Endeavour*.<sup>48</sup>

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<sup>35</sup> R Aikens, R Lord & M Bools op cit note 18 at 99.

<sup>36</sup> J Hare op cit note 9 at 689.

<sup>37</sup> R Aikens, R Lord & M Bools op cit note 18 at 99.

<sup>38</sup> WP Bennett op cit note 2 at 6.

<sup>39</sup> R Aikens, R Lord & M Bools op cit note 18 at 98.

<sup>40</sup> According to Bennett it was at this point that a need arose for a ‘distinct and separate’ document from the Register of the Bill of Lading. See WP Bennett op cit note 2 at 6. The Register of the Bill of Lading was also referred to as the ‘book of lading’ which was prepared by the ship’s mate and it was the precursor to the bill of lading as we know it today. The bill of lading developed out of the practice of the clerk providing a copy of his register to the shipper: SF Du Toit op cit note 27 at 16.

<sup>41</sup> R Aikens, R Lord & M Bools op cit note 18 at 98.

<sup>42</sup> Ibid.

<sup>43</sup> Both the consignor and the consignee would not have control of the cargo for a lengthy period of time as pointed out by SF Du Toit op cit note 27 at 13.

<sup>44</sup> R Aikens, R Lord & M Bools op cit note 18 at 99.

<sup>45</sup> SF Du Toit op cit note 27 at 24.

<sup>46</sup> *Lickbarrow v Mason* (1787) 2 TR 63, 100 ER 35 (KBD) [64-65].

<sup>47</sup> An old common law action brought to remedy the wrongful appropriation of a plaintiff’s personal property as described in the Free Dictionary by Farflex at <https://legal-dictionary.thefreedictionary.com/trover>.

<sup>48</sup> *Lickbarrow v Mason* supra note 46 at 64.



The shipment was ordered and paid for by Freeman, a merchant in Rotterdam. Four<sup>49</sup> bills of lading were signed by the master, and made out to 'order or assigns'. The master kept one bill of lading, two were endorsed in blank by Turing & Son and sent to Freeman together with a commercial invoice for the goods; and the last copy was retained by Turing & Son. Turing & Son, three days after shipping the goods, drew a set of bills of exchange upon Freeman in respect of the price of the cargo, and these bills were accepted by Freeman.

Freeman forwarded the two bills of lading and the commercial invoice to the plaintiff, to enable the plaintiff to take possession of the cargo for onward trading.<sup>50</sup> Freeman then sent a set of bills of exchange drawn upon the plaintiff for the value of the cargo, who accordingly paid them. Freeman was declared insolvent before the bills of exchange drawn by Turing & Son became due. Turing & Son consequently never received payment from Freeman and sent the bill of lading that they kept back to their agent, Mason (the 'defendant'), with instructions to take delivery of the goods on their behalf. The defendant thereafter collected the goods from the carrier, and this led to the plaintiff instituting an action in trover.

In the court *a quo*, Buller J noted that the legal question in simple terms was 'whether a bill of lading is by law a transfer of the property'.<sup>51</sup> He answered the question in the affirmative and, relying on case law, held that the bill of lading passed the property in the goods to the transferee. The House of Lords on appeal upheld the decision and referred it back to the Kings Bench, where a merchant jury decided that the transfer of a bill of lading was deemed to transfer the transferor's property in the goods if the transfer was made with that intention.<sup>52</sup>

### 2.3.2 *The transfer of constructive possession in the goods*

It is said that *Lickbarrow v Mason* was only a staging post for the development of the bill of lading, and the bill of lading's most important feature only came to be expressly recognised in the 19<sup>th</sup> century.<sup>53</sup> It is argued that the earliest decision taken by the court on the possession of the goods referred to in a bill of lading was in *Newsome v Thorton* (1806) 6 East 17, where the judge described the bill as 'an authority to receive the goods'.<sup>54</sup> In subsequent lien cases, it became evident to the courts that the bill of lading at that time did not give the holder legal

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<sup>49</sup> It is generally the norm to issue a set of three bills of lading, one is given to the ship's captain, another is forwarded to the consignee, and the consignee retains the third bill as read in *Lickbarrow v Mason* supra note 46 at 72.

<sup>50</sup> *Lickbarrow v Mason* supra note 46 at 64.

<sup>51</sup> Ibid at 74.

<sup>52</sup> GH Treitel et al op cit note 11 at 332.

<sup>53</sup> DL Donnelly op cit note 23 at 79.

<sup>54</sup> R Aikens, R Lord & M Bools op cit note 18 at 106.

possession of the goods.<sup>55</sup> Furthermore, by 1842 there was no English case law to support the symbolic transfer of possession to a named consignee or an endorsee of a bill of lading.<sup>56</sup>

The Factors Act in 1842<sup>57</sup> (in applicable cases) conferred on documents of title legislative capacity to give their holders legal possession of goods for the first time. However, it was not until 1870 in *Barber v Meyerstein* (1870) L.R. 4 H.L. 317 (*'Barber v Meyerstein'*), that the bill of lading's common law ability to give its holder legal possession of the goods came to be more fully developed.<sup>58</sup> In *Barber v Meyerstein*, Hatherley L cited with approval, the following passage from Martin B's judgment in the court below:

'There has been adopted, for the convenience of mankind, a mode of dealing with property the possession of which cannot be immediately delivered, namely, that of dealing with the symbols of the property. In the case of goods which are at sea being transmitted from one country to another, you cannot deliver actual possession of them, therefore the bill of lading is considered to be a symbol of the goods, and its delivery to be a delivery of them.'<sup>59</sup>

Therefore, the bill of lading was confirmed as a document that gave its holder symbolic possession of the goods and practically the 'key to the warehouse'.<sup>60</sup>

#### 2.4 *The legal consequences of the document of title function*<sup>61</sup>

A person in possession of a document of title is entitled to receive, hold and dispose of the document and the goods it covers.<sup>62</sup> The holder of the bill of lading can also use the bill of lading to secure payment of the goods.<sup>63</sup> A *bona fide* holder of a document of title has the right to claim delivery of the goods, transfer constructive possession and transfer ownership to a third party.

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<sup>55</sup> R Aikens, R Lord & M Bools op cit note 18 at 106.

<sup>56</sup> Ibid at 108.

<sup>57</sup> S 4 of the Factors Act 1842 reads as follows: '...all contracts of pledging or giving a lien upon such documents of title as aforesaid shall be deemed and taken to be respectively pledges of and liens upon the goods to which the same relates...'.  
<sup>58</sup> R Aikens, R Lord & M Bools op cit note 18 at 108.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> 'A bill of lading is in the nature of a *muniment* of title': EW Hotchkiss *Manual on the Law of Bills of and Contracts of Shipment* 20 ed (1928) 78.

<sup>62</sup> Č Pejović op cit note 5 at 158.

<sup>63</sup> JF Wilson op cit note 1 at 133.

#### 2.4.1 *Claim delivery of the goods from the carrier at the port of destination:*

The bill of lading is well recognised as being a symbol of the goods shipped and entitles the holder to constructive possession of the goods.<sup>64</sup> Therefore, the consignee has the right to demand delivery of the goods from the carrier at the port of destination. Nevertheless, this right is subject to the consignee surrendering the bill of lading to the carrier before the goods can be delivered.<sup>65</sup>

The doctrine of presentation will be examined in more depth in paragraph 2.5 below.

#### 2.4.2 *Transfer of constructive possession of the goods to a third party:*<sup>66</sup>

The transfer of constructive possession of the goods is considered to be the main purpose of the bill of lading,<sup>67</sup> a consequence of a legal fiction which deems the bill of lading to be a representation of the goods.<sup>68</sup> Therefore, the transfer of the bill of lading acts as a symbolic delivery of the goods. The symbolic delivery, in turn, has the same result as the physical goods being delivered.<sup>69</sup> The consignee as the *bona fide* holder of the bill of lading is, however, not always the owner of the goods since the bill of lading merely gives the holder the right to possession of the goods.<sup>70</sup>

#### 2.4.3 *Transfer of ownership of the goods to a third party:*

The transfer of the bill of lading serves as a symbolic transfer of the goods, however, it does not necessarily transfer the ownership in the goods.<sup>71</sup> In terms of South African property law, there are certain requirements that need to be met before the ownership in the goods can pass to another party,<sup>72</sup> the most important being that the parties must have the necessary intention

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<sup>64</sup> WP Bennett op cit note 2 at 18.

<sup>65</sup> JF Wilson op cit note 1 at 154.

<sup>66</sup> The court in *London and South African Bank v. Donald Currie & Co.*, 1875 Buch 29 [34] found that ‘...the law clearly recognises the validity of a constructive delivery to pass the property in goods as opposed to an actual delivery. It is laid down, for instance, that the owner of goods may make a good delivery to another person by handing over to him the keys of the warehouse in which the goods are stored (*Grotius*, 2.5.12). The key is the symbol of the property in the goods placed in the warehouse, in the same way as the bill of lading is the symbol of the property in the goods shipped on board.’

<sup>67</sup> C Proctor *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document in Financing International Sale Contracts* (unpublished LLM dissertation, the University of South Africa, 1996) 63.

<sup>68</sup> Č Pejović op cit note 5 at 50.

<sup>69</sup> Ibid.

<sup>70</sup> J Hare op cit note 9 at 699.

<sup>71</sup> Č Pejović op cit note 5 at 54.

<sup>72</sup> The requirements of transferring ownership in movable goods are as follows: first, the parties must have the capacity to transfer ownership; secondly, the seller must have the capacity to dispose of the goods in question (meaning that the person intending to pass ownership must actually be the owner of the thing or he must have the necessary authority to transfer ownership on behalf of the real owner); thirdly the seller must have the

to pass ownership in the goods.<sup>73</sup> The transfer of the bill of lading by endorsement, with the appropriate intent, may, therefore, affect the transfer of either possession or both possession and ownership of the cargo.<sup>74</sup>

A shipper or consignee will have the intention to transfer possession in the goods as opposed to ownership in the following circumstances: First, if a shipper names the agent as a consignee, or a consignee endorses the bill to an agent, the intention behind the transfer in this instance is merely to give the agent the right to possession in order to collect the goods on behalf of the shipper from the carrier.<sup>75</sup> Secondly, it could also happen that the bill is utilised as security for the payment of the goods and the banker is named as the consignee or the bill is endorsed to the bank. The intention behind the latter transfer is simply to create a ‘charge or pledge of the goods in the bank’s favour’.<sup>76</sup>

## 2.5 *The Presentation Rule*

### 2.5.1 *The function of the presentation rule*

The presentation rule is the ‘consequence’ of the bill of lading’s recognition as a document of title.<sup>77</sup> The significance of this rule is that the goods can only be delivered if the document is produced, a requirement intended to counter the problems that arise from the bill of lading being a transferable document. The presentation rule serves to protect the parties to the bill of lading contract in two ways: first, the holder of the bill is protected since the carrier has a contractual obligation in terms of the contract of carriage to strictly deliver the goods against the presentation of the bill of lading; and secondly, the carrier, in adhering to its contractual obligation, will subsequently be discharged from all other obligations it has in terms of the contract of carriage.<sup>78</sup>

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intention to transfer the ownership and the buyer must have the intention to receive ownership in the goods as read at SF Du Toit op cit note 8 at 106.

<sup>73</sup> The question ‘whether delivery of the goods is sufficient to pass ownership of the goods will depend on the intention of the parties’ as read at *Lendlease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola* 1976 (4) SA 464 (A) 309. According to the court there are two important aspects to consider in this regard. First ‘whether the contract contains conditions affecting the passing of ownership’; and secondly, ‘whether the sale is for cash or on credit’.

<sup>74</sup> J Hare op cit note 9 at 698.

<sup>75</sup> C Proctor op cit note 67 at 64.

<sup>76</sup> Ibid

<sup>77</sup> GH Treitel et al op cit note 11 at 353.

<sup>78</sup> JF Wilson op cit note 1 at 154.

### 2.5.2 *The pitfalls of the presentation rule*

Crucially, the carrier knows who the shipper of the goods is. However, due to the transferability of the bill of lading the carrier does not necessarily know who the final consignee or endorsee is. Not knowing the identity of the consignee or endorsee<sup>79</sup> the carrier relies on the bill of lading to confirm whether its holder is entitled to delivery of the goods. Hence, if the consignee or endorsee is unable to present the bill to the carrier, it poses a risk of ‘misdelivery’, in which case the carrier will be liable to the true holder of the bill.<sup>80</sup>

The risk of cargo being misdelivered is especially prevalent in situations where the bill of lading does not reach the port of destination in time. The carrier can then either insist on (waiting for) the presentation of the bill of lading which might have negative commercial and logistical consequences,<sup>81</sup> or it can release the goods without the presentation of the bill of lading. This study is concerned with the implications where the carrier elects to release the cargo without the presentation of the bill of lading.

### 2.5.3 *The legal consequences of non-compliance with the presentation rule*

The potential legal consequences of the carrier releasing the goods without the presentation of the bill of lading are as follows:

- (i) The carrier’s actions will amount to ‘wilful misconduct’ and it will be in breach of its contractual obligations.<sup>82</sup>
- (ii) In the case of misdelivery of the cargo, the carrier may not be able to rely on the protection afforded to it in the terms of the carriage contract and The Hague-Visby Rules.<sup>83</sup>
- (iii) There are also further insurance consequences as it may not qualify for protection and indemnity cover.<sup>84</sup>

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<sup>79</sup> JF Wilson op cit note 1 at 154.

<sup>80</sup> Ibid.

<sup>81</sup> F Arizon, D Semark *Maritime Letters of Indemnity* (2014) 83. For example a carrier may face claims for demurrage or damages for detention. This might also cause port congestions. A congested port will affect other shipowners and carriers.

<sup>82</sup> JF Wilson op cit note 1 at 154.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

With regard to the second consequence, it is generally understood that claims resulting from the misdelivery of cargo are not regulated by either The Hague Rules<sup>85</sup> or The Hague-Visby Rules.<sup>86</sup> Therefore, disputes arising from the carrier's failure to comply with its obligation are determined in terms of domestic laws.<sup>87</sup> The determination of disputes by domestic laws might have countervailing outcomes for carriers and is therefore not ideal for a carrier's legal certainty.

## 2.6 *Conclusion*

This chapter considered the nature of the presentation rule and the various legal principles upon which the rule is based. It is demonstrated in this chapter that the rule is integral to the function of the bill of lading as a document of title. The above discussion also demonstrates the practical problems that the rule creates for the carrier and the legal consequences that a carrier might face if the rule is not adhered to.

Nevertheless, due to factors beyond a carrier's control, it might not always be possible to promptly adhere to the presentation rule. In these circumstances a carrier might be faced with a claim for misdelivery and will wish to rely on the various protections afforded by The Hague-Visby Rules. In the following chapter, the applicability of The Hague-Visby Rules to claims for misdelivery will be considered as well as the carrier's right to rely on the time bar and limitation provisions provided for by the Rules.

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<sup>85</sup> International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (The 'Hague Rules') 1924.

<sup>86</sup> The Hague Rules as amended by the Brussels Protocol ('Hague-Visby Rules') 1968.

<sup>87</sup> Č Pejović op cit note 5 at 4.

## CHAPTER 3

### CARGO LIABILITY REGIME AND MISDELIVERY CLAIMS

#### 3.1 Introduction

As indicated in chapter 2, a carrier who elects to deliver cargo to a consignee without first requesting the presentation of the bill of lading acts at his own peril.<sup>1</sup> Consequently, the carrier will be subject to claims for misdelivery by the consignee who is entitled to delivery according to the bill of lading contract terms. A further consequence is that the carrier may lose its right to rely on the principal defences and limitations<sup>2</sup> provided for in The Hague-Visby Rules. For the most part, the rights and duties of the carrier and the consignee under the bill of lading contract are regulated by the international cargo liability regime, The Hague-Visby Rules<sup>3</sup> ('the Rules').<sup>4</sup> The Rules, as mentioned in chapter 1, constitute an amended version of The Hague Rules ('the 1924 Rules').<sup>5</sup>

The Rules apply mandatorily to contracts of carriage which are evidenced by a bill of lading<sup>6</sup>, and the period of application is from 'tackle to tackle'.<sup>7</sup> In other words, the Rules apply from the moment the ship's tackle attaches to the cargo and the cargo is loaded on to the ship until the point that the cargo is discharged from the ship, and let loose from the ship's tackle.<sup>8</sup>

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<sup>1</sup> *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] 3 All ER 182 at 184.

<sup>2</sup> GH Treitel, FMB Reynolds, TG Carver *Carver on Bills of Lading* 3 ed (2011) 759.

<sup>3</sup> The Hague Rules as amended by the Brussels Protocol ('Hague-Visby Rules') 1968.

<sup>4</sup> ME Crowley 'The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea: The Multimodal Problem' 2005 (79) *Tul. L. Rev.* 1467.

<sup>5</sup> International Convention for the Unification of Certain Rules of Law relating to Bills of Lading ('Hague Rules') 1924.

<sup>6</sup> In a recent case, *Kyokuyo Co Ltd v A.P. Moller-Maersk A/S (The 'Maersk Tangier')* [2018] EWCA Civ 778, the English Court of Appeal had to consider *inter alia* the Hague-Visby Rules' compulsory applicability to certain sea transport documents. Contrary to the shipper's right to demand the issue of a bill of lading, the carrier never issued a bill of lading. Subsequently, the consignee accepted a sea waybill in lieu of a bill of lading. The Court of Appeal had to determine 'whether, when a shipper accepts a sea waybill instead of a bill of lading, the carriage is nevertheless 'covered' by a bill of lading'. The court held 'that a contract of carriage will be "covered" by a bill of lading whenever the shipper has a right to demand a bill of lading, and the actual document used to cover the transport document will make no difference' as read at S Masters, D Bovensiepen 'Judgment: *Kyokuyo Co Ltd v A P Møller-Maersk A/S trading as "Maersk Line" ("The Maersk Tangier")*' *Lexology* 17 April 2018, available at <https://www.lexology.com/library/detail.aspx?g=35b942f5-6d63-474c-81c4-46c00d745a29>, accessed on 21 February 2019.

<sup>7</sup> W Tetley *Marine Cargo Claims* 3 ed (1927) 14.

<sup>8</sup> JF Wilson *Carriage of Goods by Sea* 7 ed (1988) 181. The parties to the carriage contract can agree that the Rules will apply beyond 'ship's tackle' as stated in W Tetley op cit note 7 at 15. In terms of article VII of the Rules, 'nothing... contained [in the Rules] shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody or care and handling of goods prior to

The misdelivery of cargo most often occurs after the discharge of the goods.<sup>9</sup> This is especially the case with containerised cargo where delivery inevitably entails a combined or multimodal form of transport,<sup>10</sup> as opposed to bulk cargo such as oil where delivery can take place simultaneously with discharge.<sup>11</sup> The Rules theoretically only cover the period of the carriage of the goods by sea and not when transported by road or rail.<sup>12</sup> This gives rise to the issue of the applicability of the Rules to claims for cargo that is ‘discharged’ from the vessel and subsequently misdelivered.

In this chapter, the relevant provisions in the Rules, various judicial decisions and academic opinions will be considered to determine the applicability of the Rules to claims arising post-discharge. Determining the applicability of the Rules is the precursor to two further questions: first, whether the one-year time bar is applicable to claims for misdelivered cargo and secondly whether the carrier, if found liable, can rely on the ‘package limitation’ provided for by the Rules.

### 3.2 *The applicability of the Rules*

In terms of article 1(b) of the Rules, the Rules apply to a ‘contract of carriage covered by a bill of lading or similar document of title, in so far as such document relates to the carriage of goods by sea . . .’. Furthermore, article 1(e) defines ‘carriage of goods’ as the ‘period from the time when the goods are loaded on to the time they are discharged from the ship’.

In order to determine the applicability of the Rules to claims which arise post-discharge, two arguments have to be considered. First, whether the Rules apply to a period of time or to the contract of carriage itself. Secondly, if the Rules apply to a period of time, at what point will they cease to operate.

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the loading on, and subsequent to, the discharge from the ship on which the goods are carried by sea.’

<sup>9</sup> It is rare for carriers to deliver the cargo to consignees at the ship’s rail since the consignee will normally only collect the cargo after it has been in storage at or near the wharf for a period of time as noted in GH Treitel, FMB Reynolds & TG Carver op cit note 2 at 662.

<sup>10</sup> W Leung ‘Misdelivery of Cargo without Production of Original Bill of Lading: Applicability of the Mandatory Legal Regime of Hague-Visby and the One Year Time Bar’ 2008 (39) *Mar. L. & Com.* 205.

<sup>11</sup> P Todd ‘Limiting liability for misdelivery’ 2008(2) *LMCLQ* 219.

<sup>12</sup> W Leung op cit note 10 at 205.



### 3.2.1 A temporal application of the Rules

It is argued that the rights and duties afforded by the Rules to a carrier are attached to a period of time,<sup>13</sup> and the period of time is determined by the definition of ‘carriage of goods’ in article 1(e) of the Rules. Therefore, a claim which arises either before loading or after discharge will not fall within the ambit of article 1(e). Consequently, the Rules will not apply to such a claim. The countervailing argument is that the Rules apply to the whole (or part) of the contract of carriage.<sup>14</sup> In *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd*<sup>15</sup> one of the issues before the court was whether the Rules were applicable to a claim which arose before the loading of the cargo was complete. It was held by Devlin J that the loading and offloading of cargo were covered by the Rules:

‘[In] construing Art. 1(b) and (e) and Art. II, that the operation of the Rules was determined by the limits of the contract of carriage of goods by sea and not by any limits of time...’<sup>16</sup>

It is contended that the conclusion of Devlin J embodies the intention of the drafters of the Rules<sup>17</sup> that the defences negotiated and agreed to by the carriers<sup>18</sup> (and subsequently included in the Rules) would apply to the entire contract of carriage to which the Rules are applicable.<sup>19</sup>

The English Court of Appeal in the *Captain Gregos* case<sup>20</sup> accepted that the definition in article 1(e) assigns a temporal term to the carriage of goods. Support is drawn from this decision to argue that the Rules do not apply to events occurring before loading or after discharge.

The court in *Pyrene Co Ltd. v Scindia Steam Navigation Co. Ltd*<sup>21</sup> relied on the carrier’s contractual obligations, which *inter alia* included acting as bailee until delivery, to conclude that the Rules and the immunities it provided applied until the cargo was delivered. However,

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<sup>13</sup> *Pyrene Co Ltd. v Scindia Steam Navigation Co. Ltd* [1954] 1 Lloyd’s Rep. 327. The Plaintiff’s counsel argued that the accident occurred before the cargo was loaded on the vessel and therefore it fell outside the period specified in art I(e) of the Rules. It was held by Devlin J that such an argument was ‘fallacious’.

<sup>14</sup> In *Pyrene Co Ltd. v Scindia Steam Navigation Co. Ltd* supra note 13 it was held by Devlin J that ‘[the Rules] attach to a contract or part of a contract’.

<sup>15</sup> *Pyrene Co Ltd. v Scindia Steam Navigation Co. Ltd* supra note 13.

<sup>16</sup> Ibid at 327.

<sup>17</sup> M Clarke ‘Misdelivery and Time Bars’ (1989) *LMCLQ* 395.

<sup>18</sup> Per Wright J in *American Company Ltd, And Gosse Miller Ltd v Canadian Government Merchant Marine Ltd (The ‘Canadian Highlander’)* [1927] 28 Lloyd’s Rep. 88 at 102 stated with regards to the force of law of the Hague Rules that ‘... according to the previous law, shipowners were generally common carriers, or were liable to the obligations of common carriers, but they were entitled to the utmost freedom to restrict and limit their liabilities, which they did by elaborate and mostly illegible exceptions and conditions.’

<sup>19</sup> M Clarke op cit note 17 at 395.

<sup>20</sup> [1990] 1 Lloyd’s Rep. 310 at 315.

<sup>21</sup> [1954] 1 Lloyd’s Rep. 321.

Reynolds argues that if the carrier continues to hold the cargo after it is discharged from the vessel and before it is delivered to the consignee, it clearly does so in its capacity as bailee.<sup>22</sup> Its capacity as bailee is in terms of the contract or on the grounds of the general principles of bailment.<sup>23</sup> Consequently, the provisions in the Rules no longer apply as the Rules cease to operate once the cargo is discharged from the vessel.

In a more recent case, the English Commercial Court held that:

‘Unless the parties agree to an extended operation, there is a temporal sphere of operation to the Rules, usually referred to as the “period of responsibility” which do not on their own terms apply to activities occurring outside that period of responsibility.’<sup>24</sup>

Nevertheless, it is noted that article 1(e) of the Rules is merely a ‘triggering’ section defining the ‘carriage of goods’.<sup>25</sup> Therefore, it is article II of the Rules that essentially determines and limits the operation of the Rules. This article provides for the ‘rights and immunities’ of carriers, and limits these to the operations of loading and discharge.<sup>26</sup>

### 3.2.2 *The point at which the Rules cease to operate*

The so-called ‘before and after issue’<sup>27</sup> is the subject of debate in various legal jurisdictions where the Rules are applicable.<sup>28</sup> For the purpose of this study, it is the latter aspect, the ‘after issue’ that will be considered in more depth.<sup>29</sup>

Article II of the Rules also determines the carrier’s rights and immunities and gives the carrier the right to limit its liability. Moreover, it is also considered the ‘key article’<sup>30</sup> to which to refer in order to determine whether the Rules apply to claims arising after the cargo is discharged. Article II provides as follows:

‘Under every contract of carriage of goods by sea the carrier in relation to loading, handling, stowage, carriage, custody, care and *discharge* of such goods shall be subject to the

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<sup>22</sup> GH Treitel, FMB Reynolds & TG Carver op cit note 2 at 663.

<sup>23</sup> Ibid.

<sup>24</sup> *Deep Sea Maritime Ltd v Monjasa A/S (The ‘Alhani’)* [2018] 2 Lloyd’s Rep. 563 at 568.

<sup>25</sup> P Todd op cit note 11 at 220.

<sup>26</sup> Ibid.

<sup>27</sup> F Reynolds ‘The Hague Rules, The Hague-Visby Rules, and the Hamburg Rules’ (1990) 7 *MLAANZ Journal* 28.

<sup>28</sup> W Leung op cit note 10 at 212.

<sup>29</sup> The before issue relates to the loading of the cargo on to the ship by the carrier. For a comprehensive consideration of the application of the Rules to the loading of cargo and the meaning of the term see the Devlin J’s judgment in *Pyrene Co Ltd. v Scindia Steam Navigation Co. Ltd* supra note 13 at 326 – 329.

<sup>30</sup> *Compania Portoraffi Commerciale S.A. v Ultramar Panama Inc. And Others (The ‘Captain Gregos’)* [1989] 2 Lloyd’s Rep. 63 at 69.

responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.’  
(author’s emphasis)<sup>31</sup>

The Rules do not define the term ‘discharge’, and so it is necessary to first determine the meaning of the term within the context of the Rules in order to determine when the carrier’s rights and immunities cease under article II. The difference between the discharge operation and delivery will also be considered.

### 3.2.3 *The meaning of discharge and deliver within the context of the Rules*

There are practical differences between the discharge of cargo and the delivery thereof,<sup>32</sup> the former being ‘a physical act of removal’ of the goods from the ship, and the latter a legal concept denoting the transfer of possession in the goods.<sup>33</sup> Moreover, the term delivery may also operate in two additional ways. First, it may denote the ‘actual delivery’ of the goods,<sup>34</sup> which occurs when the cargo is released from the ship’s tackle or the consignee takes (or is able to take) the goods into its custody.<sup>35</sup> Secondly it may mean the constructive delivery of the goods, which entails the ‘safe and reasonable tendering of delivery’.<sup>36</sup>

The Rules do not specifically impose an obligation on the carrier to deliver the cargo or to deliver it ‘properly’, even though the term is used in other sections of the Rules.<sup>37</sup> According to Tetley, the use of the term deliver (instead of discharge) in other sections of the Rules, and the specific inclusion of the term discharge in article III(2)<sup>38</sup> was done ‘purposefully’.<sup>39</sup> He reasons that the Rules make reference to the term discharge in lieu of deliver in article 1(e) and article II because the ‘period of responsibility during which the Rules apply ends when the operations which devolve upon the ship come to an end’.<sup>40</sup> This means that the Rules do not regulate or apply to events such as delivery which is subsequent to the discharge operations.

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<sup>31</sup> The Hague-Visby Rules.

<sup>32</sup> R Aikens, R Lord & M Bools *Bills of Lading* 2 ed (2015) 485.

<sup>33</sup> Ibid. *P.S. Chellaram & Co. Ltd v China Ocean Shipping Co (The ‘Zhi Jiang Kou’)* [1991] 1 Lloyd’s Rep. 493.

<sup>34</sup> W Tetley op cit note 7 at 570.

<sup>35</sup> GH Treitel, FMB Reynolds & TG Carver op cit note 2 at 663.

<sup>36</sup> That is, the notifying of the consignee of the time and port where the cargo will be discharged and arranging a safe and secure place for the goods to be kept in order to allow the consignee a reasonable time to collect the goods after discharge as read at W Tetley op cit note 7 at 570.

<sup>37</sup> W Tetley op cit note 7 at 563. Art III(6) makes provision for the giving of notice of loss or damage within three days of the cargo being delivered. It also makes provision for a time-bar of one year ‘of the delivery of the goods or the date when the goods should have been delivered’.

<sup>38</sup> Art III(2) deals with the carrier’s principal responsibilities in terms of the Rules.

<sup>39</sup> W Tetley op cit note 7 at 569.

<sup>40</sup> WL McNair, AA Mocatta *Scrutton on Charterparties and Bills of Lading* 15 ed (1886) 455 cites *The Canadian Highlander* [1927] 28 Lloyd’s Rep. 88 in support of this notion.

From a reading of the Travaux-Préparatoires<sup>41</sup> of the Rules, it is apparent that the sub-committee's intention was for the Rules to apply until the 'unloading' of the cargo from the ship.<sup>42</sup> Therefore, one can infer that the term 'discharge' denotes the unloading of cargo. Furthermore, there were concerns amongst the committee members that the use of the term 'delivered' instead of 'discharge' would create unnecessary ambiguity, which would result in varied interpretations by domestic courts.<sup>43</sup> Although the drafters of the Rules attempted to prevent ambiguity through the use of the term discharge, it has nevertheless left room for deliberation and interpretation by domestic courts. A few of these judicial decisions will be considered in order to determine whether the Rules apply after the discharge operation.

### 3.2.4 *Applicability of the Rules to claims arising after discharge*

The issue surrounding the application of the Rules and when they cease to operate has been a contentious issue,<sup>44</sup> especially after the English Commercial Court's decision in the *Captain Gregos*.<sup>45</sup> In the case it was alleged by the cargo owners that part of its crude oil was stolen by the carrier at the time of delivery – more a case of theft than misdelivery – but relevant since the court had to consider whether 'delivery' falls within the scope of article II.<sup>46</sup> The court found that article II described the various stages at which the carrier may be held responsible and liable, and furthermore when it can rely on its rights and immunities set out in the Rules.<sup>47</sup> The court held that the first stage was the loading of the goods and the last stage the discharge of the goods, with the intermediary stages being 'handling, stowage, carriage, custody, and care', in-between loading and discharging.<sup>48</sup> The court held further that article II was 'inherently inapt to embrace delivery, which imports concepts of possessory or proprietary rights, alien in my judgment to these carefully listed transformational stages'.<sup>49</sup> Therefore, the court concluded that since article II did not make provision for the delivery of the goods, the Rules did not apply to any form of misdelivery of whatever kind.

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<sup>41</sup> The Travaux Préparatoires 'comprises of the minutes of discussions and presentations leading up to the adoption of the Hague-Rules and the Brussels Protocol and they provide a wealth of background to the adoption of the Rules' as detailed in J Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed (1999) 651.

<sup>42</sup> Comité Maritime International 'The Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules', available at <https://comitemaritime.org/wp-content/uploads/2018/05/Travaux-Preparatoires-of-the-Hague-Rules-and-of-the-Hague-Visby-Rules.pdf>, accessed on 29 July 2019.

<sup>43</sup> Ibid.

<sup>44</sup> W Leung op cit note 10 at 215.

<sup>45</sup> *The Captain Gregos* supra note 30.

<sup>46</sup> The court in *The Captain Gregos* supra note 30 refers to art II and its contents as a 'package'.

<sup>47</sup> *The Captain Gregos* supra note 30 at 69.

<sup>48</sup> Art II of the Hague-Visby Rules.

<sup>49</sup> *The Captain Gregos* supra note 30 at 69.

The conclusion in *Captain Gregos* has been challenged as incorrect for various reasons, *inter alia* that it erred in not having regard to the broader context of the Rules.<sup>50</sup> This argument is ironic since Hirst J expressly notes that in reaching his conclusion he took into consideration the need to adopt a ‘broad and purposive approach’ when interpreting the Rules.<sup>51</sup>

It is further argued that the court’s assumption that the operations mentioned in article II follow a sequence and are limited thereto, is incorrect.<sup>52</sup> This argument conforms with the decision of the Appeal Court of New South Wales in the *Zhi Jiang Kou*,<sup>53</sup> in which the court disagreed with the views Hirst J regarding article II, holding that article II of the Rules ‘does not . . . establish a category limited to events arising from loading to discharge, strictly so confined’. The Court of Appeal in *Captain Gregos*<sup>54</sup> did not expressly consider the Commercial Court’s view on the contents of article II being restricted to a sequence of events beginning and ending with the loading and discharge of cargo. Nevertheless, the court noted that it read article II as ‘defining the scope of the operations to which the responsibilities, rights and immunities in the Rules apply’.<sup>55</sup>

The Court of Appeal came to a conclusion different to that of the Commercial Court with regard to the application of the Rules to the claim for short-delivery of the cargo. However, it is distinguishable in that it held that the breach actually occurred before discharge.<sup>56</sup> The alleged cargo was allegedly stolen during transit. Bingham LJ noted that there was no point in characterising the claim for theft as one of misdelivered cargo,<sup>57</sup> and treated the claim as based on the theft of the cargo as opposed to the misdelivery thereof. Consequently, it is argued that as the Appeal Court did not consider the issue relating to the applicability of the Rules to claims for misdelivered cargo, it was not authority for the issue of misdelivery.<sup>58</sup>

In a case dealing with cargo which was misdelivered as a result of the presentation of a fraudulent set of bills of lading,<sup>59</sup> Aikens J in the English Commercial Court held that on the

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<sup>50</sup> M Clarke op cit note 17 at 395.

<sup>51</sup> *The Captain Gregos* supra note 30 at 69.

<sup>52</sup> M Clarke op cit note 17 at 395.

<sup>53</sup> [1991] 1 Lloyd’s Rep 493 at 516.

<sup>54</sup> *The Captain Gregos* supra note 20 at 310.

<sup>55</sup> Ibid at 315.

<sup>56</sup> W Leung op cit note 10 at 217.

<sup>57</sup> *The Captain Gregos* supra note 20 at 315.

<sup>58</sup> W Leung op cit note 10 at 218.

<sup>59</sup> The cargo was discharged from the vessel and was stored at a Chinese container terminal according to *Trafigura Beheer BV and Another v Mediterranean Shipping Company SA (The ‘MSC Amsterdam’)* [2007] 2 Lloyd’s Rep. 622 at 622.

true construction of the bill of lading, the Rules<sup>60</sup> did not apply to matters after discharge.<sup>61</sup> In *MSC Amsterdam*<sup>62</sup> Aikens based his decision on a consideration of the terms of the bill of lading. However, prior to this case, he wrote that there was ‘little justification’ for the operation of the Rules to be extended beyond the discharge of the cargo.<sup>63</sup> He argues that it is clear from the wording of the Rules that it does not apply to the period after discharge. Moreover, it is unnecessary for the Rules to be extended to the period after discharge since it is regulated by the contract of carriage which makes provision for the carrier’s liability to be limited.<sup>64</sup> Tetley takes the same stance as Aikens, also basing his conclusion on a strict reading of the Rules which he said made it clear that the Rules do not apply to claims after the discharge of the cargo.<sup>65</sup>

On appeal, the decision of the Commercial Court in *MSC Amsterdam* was upheld by the English Court of Appeal<sup>66</sup> on the main ground that the parties did not intend the Rules to apply after the discharge of the cargo from the vessel.<sup>67</sup> The *ratio decidendi* of the Court of Appeal is based on the judgments in the *Canadian Highlander*<sup>68</sup> and the *Pyrene Co Ltd. v Scindia Steam Navigation Co. Ltd.*<sup>69</sup> In terms of the former case, the period of responsibility in terms of article 1(e) ends once the cargo is discharged from the ship.<sup>70</sup> The latter case founded the doctrine<sup>71</sup> that the purpose of the Rules ‘is not to define the scope of the contract but the terms on which that service is to be performed’.<sup>72</sup>

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<sup>60</sup> It is interesting to note that in this case the court also had to consider whether the Hague Rules or Hague-Visby Rules were applicable. The carriage of the goods was from Durban, South Africa (a non-contracting state, but subject to The Hague-Visby Rules through legislation). The bill of lading contained a paramount clause incorporating either The Hague or The Hague-Visby Rules. The carrier contended that the former was applicable, whereas the claimants argued that the latter was to apply to the contract of carriage. The Commercial Court held that the Hague Rules applied. This decision was however, reversed by the Court of Appeal, which held that the Hague-Visby Rules applied. For a thorough discussion see P Todd op cit note 11 at 216 – 218.

<sup>61</sup> *The MSC Amsterdam* [2007] EWHC 944 (Comm) at 39.

<sup>62</sup> Ibid.

<sup>63</sup> R Aikens, R Lord & M Bools op cit note 32 at 487.

<sup>64</sup> Ibid.

<sup>65</sup> W Tetley op cit note 7 at 564.

<sup>66</sup> The Court of Appeal confirmed the decision of the Commercial Court, however, it held that on a true construction of the bill of lading terms it was the Hague Rules and not the Hague-Visby Rules (as held by the court of first instance) which were applicable: *The MSC Amsterdam* supra note 59 at 627.

<sup>67</sup> *The MSC Amsterdam* supra note 59 at 623.

<sup>68</sup> *The Canadian Highlander* supra note 18.

<sup>69</sup> [1954] 1 Lloyd’s Rep. 327.

<sup>70</sup> *The MSC Amsterdam* supra note 59 at 628.

<sup>71</sup> Two cases are cited by Longmore to support the dictum of Devlin J as accepted doctrine: *Producers Meats Ltd v Shaw Savill & Albion Co. Ltd (The ‘Arawa’)* [1977] 2 Lloyd’s Rep. 416 at 424; *The Captain Gregos* supra note 20 at 311.

<sup>72</sup> *The MSC Amsterdam* supra note 59 at 628.

It is noted from the judgment in the *MSC Amsterdam* that the Rules will only be applicable post-discharge if this is the intention of the parties, which can either be implied from their conduct or expressed in the bill of lading.<sup>73</sup> Therefore, where there is no express provision in the contract, and the carrier nevertheless continues to render its services in regards to the cargo, it may be inferred that it was the intention of the contracting parties that the duties and defences provided for in the Rules continue to apply after discharge.<sup>74</sup> However, this is subject to the express terms in the bill of lading not indicating anything to the contrary. Since the court based its decision on the contractual terms, at most the judgment lends support for an argument that the application of the Rules may be implied.<sup>75</sup> This judgment does not, however, settle the question whether the Rules apply post-discharge, notwithstanding the contractual terms.<sup>76</sup>

Nevertheless, it is evident that the direction taken by the court in the *MSC Amsterdam* will be repeated, as is seen in a recent case, the *Alhani*,<sup>77</sup> in which the English Commercial Court was faced with a claim for the misdelivery of cargo which was a consequence of the non-production of the bill of lading. The misdelivery, however, occurred when the cargo was transferred from one ship to another. The court therefore, did not deem it necessary to determine whether the Rules were applicable to the said claim, for the reason that ‘the very act of misdelivery to a third party – the ship-to ship transfer – was also the means by which the cargo was discharged from the vessel.’<sup>78</sup> Aikens argues that it would nevertheless be anomalous to conclude that the carrier’s right to rely on the package limitation or time bar provision provided for in the Rules depends on the carrier’s alleged default occurring before or after the cargo is freed from the ship’s rail.<sup>79</sup> It is argued that in terms of article III, rule 6 of the Rules that the time bar provision applies to events occurring post-discharge.<sup>80</sup> This argument is supported by the wording ‘in relation to’ in article II.<sup>81</sup>

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<sup>73</sup> *The MSC Amsterdam* supra note 59 at 628.

<sup>74</sup> R Shaw ‘Analysis and comment: *Trafigura Beheer BV and Another v Mediterranean Shipping Co (SA)*’ (2007) 13 *JIML* 238.

<sup>75</sup> P Todd op cit note 11 at 219.

<sup>76</sup> *Ibid.*

<sup>77</sup> [2018] 2 *Lloyd’s Rep* 563 at 568.

<sup>78</sup> *Ibid.*

<sup>79</sup> R Aikens, R Lord & M Bools op cit note 32 at 487.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

### 3.3 *The effect of the carrier's contractual breach on its right to rely on the time bar provision*

A carrier that misdelivers cargo subsequent to the non-production of the bill of lading runs the risk of forfeiting its right to rely on the exception and limitation provisions provided for in the Rules. This is based on the argument that the misdelivery of cargo amounts to a serious breach of contract.<sup>82</sup> Consequently, a cargo owner can rely on a nominal wrong such as a breach of contract resulting from an operation which is not included in article II, such as misdelivery, to replace the time bar provided for in the Rules with the more stringent limitation period (for the carrier) found in the common law.<sup>83</sup> The common law time bar will inevitably be longer than that of the time bar period in the Rules. For example, under English<sup>84</sup> and South African law<sup>85</sup> a cargo claimant has six and three years respectively within which to institute a claim. According to Professor Hare, a carrier will not lose its right to rely on the time bar provision if found in breach of its contractual obligations under the South African COGSA. This is based on the fact that in South African law the normal rules of contractual breach and remedy would prevail. Moreover, it would be 'inconceivable that a breach by one of the parties could have the effect of removing the statutory terms of The Hague-Visby Rules'.<sup>86</sup>

The Rules are meant to operate as a 'uniform law'; however, there are instances where for historical reasons the Rules are inadequate and have to be supported by the contract of carriage and by municipal law.<sup>87</sup> Nevertheless, limiting the carrier's right to rely on the time bar provision based on the English doctrine of fundamental breach is dangerous,<sup>88</sup> 'unsound',<sup>89</sup> and neither useful nor elegant.<sup>90</sup> Furthermore, it will destroy the purpose behind the Rules which is to provide a standard set of terms recognised by the international community.<sup>91</sup>

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<sup>82</sup> *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* supra note 1 at 185-186; *The Captain Gregos* supra note 30 at 63.

<sup>83</sup> BJ Davenport 'Limits on the Hague Rules' (1989) 105 L.Q.R 521 at 523.

<sup>84</sup> In the United Kingdom, s 5 of the Limitation Act 1990 bars the initiation of a contractual claim after the expiration of six years from the time when the goods in question were delivered or should have been delivered: JF Wilson op cit note 8 at 204.

<sup>85</sup> Prescription Act 68 of 1969. In terms of the Admiralty Jurisdiction Act where a 'process' is issued (see se 12(a) for the commencement of an action) it is required to be served within 12 months failing which it shall lapse: J Hare op cit note 41 at 817.

<sup>86</sup> Ibid at 817-818.

<sup>87</sup> M Clarke op cit note 17 at 396.

<sup>88</sup> BJ Davenport op cit note 83 at 521.

<sup>89</sup> In reaching this conclusion two cases are referred to, namely: *Suisse Atlantique Société d'Armement Maritime S.A. v N.V. Rotterdamsche Kolen Centrale* [1976] 1 A.C. 361 and *Photo Production Ltd. v Securicor Transport Ltd* [1980] A.C. 827.

<sup>90</sup> M Clarke op cit note 17 at 396.

<sup>91</sup> BJ Davenport op cit note 83 at 523.



Consequently, it was held by the Court of Appeal in the *Kapitan Petko Voivoda* that: ‘the seriousness of the breach is no longer a self-sufficient yardstick for determining whether the exception or limitation clauses apply to particular breaches.’<sup>92</sup> Notwithstanding the consequence of the carrier’s contractual breach, there is the issue of whether the actual limitation and exception provisions apply to claims for misdelivered cargo.

### 3.4 *The time bar provision in the Rules*

A general time limit is normally provided for by municipal legislation, which will require that claims for lost or damaged goods have to be instituted within a certain period of time.<sup>93</sup> Likewise, the Rules contain a time-bar provision of one year<sup>94</sup> which is significantly shorter than that provided for by the municipal law of the United Kingdom and South Africa.

#### 3.4.1 *The operation and legal consequence of the time bar*

According to article III, rule 6, a cargo owner who wishes to institute a claim against the carrier must do so within one year from either the time of ‘delivery’ of the cargo or when ‘delivery ought to have occurred’.<sup>95</sup> The deliberate<sup>96</sup> use of the term delivery supports the notion that the operation of discharge is completely separate and distinct from that of delivery for the purpose of the Rules.<sup>97</sup> Article III, Rule 6 expressly makes reference to delivery, which is the last of the carrier’s obligations in terms of the contract of carriage.<sup>98</sup> The time bar therefore, runs from the time the cargo is delivered (as opposed to discharged) from the ship. A constructive form of delivery is required in order for the time bar to start operating.<sup>99</sup> However, in the circumstances where the cargo is discharged and delivered simultaneously (which is normally the case with bulk cargo) the time bar will begin to run from the date when the said discharge operation is completed.<sup>100</sup> The actual delivery date will be called into question either when the carrier has failed to deliver the cargo due to a total loss of the ship and the cargo,<sup>101</sup> or when

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<sup>92</sup> [2003] 2 Lloyd’s Rep 1 at 10.

<sup>93</sup> JF Wilson op cit note 8 at 204.

<sup>94</sup> There is a commercial reason behind the Hague and Hague-Visby Rules containing a one year time bar which is to ‘enable carriers to “clear their books” of claims’ as read at R Aikens, R Lord & M Bools op cit note 32 at 515.

<sup>95</sup> Art III, Rule 6 of The Hague and Hague-Visby Rules.

<sup>96</sup> Wilson notes that the use of the word ‘delivery’ was done deliberately: JF Wilson op cit note 8 at 204.

<sup>97</sup> For a discussion on the meaning of the terms discharge and delivery revert back to sub-sub paragraph 3.2.3.

<sup>98</sup> M Clarke op cit note 17 at 395.

<sup>99</sup> JF Wilson op cit note 8 at 204.

<sup>100</sup> R Aikens, R Lord & M Bools op cit note 32 at 518.

<sup>101</sup> Ibid.

the cargo is delivered under what is considered to be a ‘separate and distinct contract’.<sup>102</sup> Nevertheless, where the cargo is delivered, but delivered damaged or late, it is the actual delivery date which will determine when the time bar starts to run.<sup>103</sup>

The time bar provision is absolute<sup>104</sup> and will lapse exactly one year post-delivery. The cargo owner who fails to bring a claim within the time-period will have its claim against the carrier extinguished.<sup>105</sup> Therefore, the time-bar provision is described as a ‘powerful weapon’ readily available to the carrier as a defence against a claim brought by the cargo-owner claimant.<sup>106</sup> Whether the carrier will be able to rely on this provision as a defence against a claim for wrongful delivery is, however, debatable.<sup>107</sup>

### 3.4.2 *The applicability of the time bar to claims for misdelivery*

In order to determine whether the time-bar provision is applicable to claims for misdelivered cargo the wording of the provision, article III, rule 6 will be considered. More specifically, the scope of the phrase ‘in any event’ will be examined and thereafter the effect of the inclusion of the words ‘all liability whatsoever’ in the Rules will be discussed.

The most recent English case to deal with the issue of the time bar and its applicability to misdelivery claims is the *Alhani*.<sup>108</sup> The English Commercial Court however, considered the un-amended provision of article III provided for in the 1924 Rules which reads as follows:

‘. . . In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year. . .’<sup>109</sup>

The court nevertheless considered the key phrase ‘in any event’ which remained unchanged and whether it included a situation where the cargo was delivered to the wrong consignee. Foxton J found<sup>110</sup> that the phrase ‘in any event’ was wide enough to include claims for misdelivery. In support of this, the *Happy Ranger*<sup>111</sup> was cited, in which Tuckey LJ found

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<sup>102</sup> JF Wilson op cit note 8 at 205.

<sup>103</sup> R Aikens, R Lord & M Bools op cit note 32 at 518.

<sup>104</sup> W Leung op cit note 10 at 210.

<sup>105</sup> *Aries Tanker Corporation v Total Transport Ltd (The ‘Aries’)* [1977] 1 Lloyd’s Rep. 334 at 336.

<sup>106</sup> J Hare op cit note 41 at 817.

<sup>107</sup> Ibid at 817 – 818.

<sup>108</sup> *The Alhani* supra note 24. In this case the claimant, was the shipper under the bill of lading. Therefore, the claimant was a party to the contract of carriage. It should, however, be noted that in chapter 1 at paragraph 1.4, the scope of this study is limited to considering the rights of the carrier. Therefore, the position of a claimant (that is a cargo owner or shipper of the goods) and the effect of the time bar on the claim in that respect is not considered in chapter 3 since it is outside the scope of this study.

<sup>109</sup> Art III, r 6 of the 1924 Rules.

<sup>110</sup> *The Alhani* supra note 24 at 578.

<sup>111</sup> *Parsons Corporation v CV Scheepvaartonderneming (The ‘Happy Ranger’)* [2002] 2 Lloyd’s Rep. 357.

that the scope of article III, rule 6 is limitless and the phrase ‘in any event’ means exactly what it says. Therefore, no other interpretation of it was necessary. It was further noted that ‘a limitation of liability is different in character from an exception’.<sup>112</sup> In essence, the time-bar provision should not be limited by the wording used in the exception provisions, such as those found in article IV, since the nature of the wording differs. Therefore, article III, rule 6 contains wording which makes it more inclusive than that of the other provisions in the 1924 Rules and the Rules.

After extensive consideration of case law,<sup>113</sup> Foxton J held that the time bar applied to claims arising from the misdelivery of the cargo.<sup>114</sup> However, this was subject to the claim ‘occurring during the 1924 Rules period of responsibility’.<sup>115</sup> The Commercial Court’s decision is being appealed against by the shipper,<sup>116</sup> and so finality on the issue must await the Court of Appeal judgment. Whereas the *Alhani* judgment is relevant to misdelivery claims under the 1924 Rules, it is conceivable that a court will come to the same conclusion where a claim for misdelivered cargo is brought under the Rules.<sup>117</sup> This is especially so since the Rules contain an amended version of article III, rule 6, which has made its scope even broader.

### 3.4.3 *The purpose of the amendment contained in article III, Rule 6 of the Rules*

The wording of 1924 Rules and the Rules differ in paragraph three of article III, rule 6. The 1924 Rules read: ‘. . . in any event, the carrier and the ship shall be discharged from all liability in respect of loss or damage’.<sup>118</sup> The amended Rules qualify liability with the word ‘whatsoever’, and the phrase ‘in respect of loss or damage’ is replaced with ‘in respect of the goods’. The rationale for the amendment is arguably to make the time bar provision applicable to claims for misdelivered cargo resulting from the non-presentation of the bill of lading.<sup>119</sup>

<sup>112</sup> *The Happy Ranger* supra note 111 at 358.

<sup>113</sup> *Inter alia The Happy Ranger* supra note 111 at 357; *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd (The ‘Kapitan Petko Voivoda’)* [2003] 2 Lloyd’s Rep. 1; *The MSC Amsterdam* supra note 59 at 594; *The Captain Gregos* supra note 20 at 310. *Salmond & Spraggon (Australia) (Pty) Ltd v Joint Cargo Services (Pty) Ltd & Another (The ‘New York Star’)* [1980] 1 Lloyd’s Rep. 317 was also briefly considered. However, this case did not actually consider the time bar provision in The Hague or Hague-Visby Rules but rather a contractual provision which was ‘modelled’ on article III, Rule 6’.

<sup>114</sup> *The Alhani* supra note 24 at 578.

<sup>115</sup> *Ibid.*

<sup>116</sup> F Gavin, E Dickens ‘UK: Hague Rules time limit applies to misdelivery claims’ *Mondaq* 19 October 2018, available at <http://www.mondaq.com/uk/s/747136/Marine+Shipping/Hague+Rules+Time+Limit+Applies+To+Misdelivery+Claims>, accessed on 15 September 2019.

<sup>117</sup> AP Topping ‘The Hague Rules – Time limit applies to misdelivery claims’ *SafeWaters Underwriting Managers* 20 June 2018, available at <https://safewatersmarine.com/the-hague-rules-time-limit-applies-misdelivery-claims/>, accessed on 28 February 2019.

<sup>118</sup> Art III, r 6 of the 1924 Hague Rules.

<sup>119</sup> A Diamond ‘The Hague-Visby Rules’ (1978) *LMCLQ* 256.

Moreover, the amendment is intended to allow for the discharge of banks and other parties from the letters of indemnity issued by them after the one-year period.<sup>120</sup> The argument that the amendment is intended to make the time bar applicable to claims for misdelivered cargo is based on the recommendations made by the sub-committee at the 1963 Stockholm Conference.<sup>121</sup> The use of the Travaux Préparatoires of the Rules is permissible in both Public International law and English law.<sup>122</sup> The reliability of the Travaux Préparatoires is, however, subject to there being a ‘definitive legislative intention’ amongst the committee members on the issue in question.<sup>123</sup> The discussion by the sub-committee was noted to display such a legislative intention to apply the time bar to claims for wrongful delivery.<sup>124</sup> Despite the sub-committee’s definitive legislative intention,<sup>125</sup> the authors, McNair and Mocatta express doubt on whether the amended wording is ‘strong enough’ to make the Rules applicable to all circumstances giving rise to claims for misdelivered cargo.<sup>126</sup>

#### 3.4.4 *The consequence of the amendment on claims for misdelivered cargo*

The effect of the amendment is questioned by some legal authors.<sup>127</sup> However, there is one author who, albeit hesitantly,<sup>128</sup> maintains that the inclusion of the word ‘whatsoever’ has had the desired effect of broadening the scope of article III, rule 6.<sup>129</sup> This will give the time bar provision contained in the Rules, a wider scope compared to that contained in the 1924 Rules. The amended article III, rule 6 in the Rules provides as follows:

‘. . . [T]he carrier and the ship shall in any event be discharged from all liability whatsoever<sup>130</sup> in

<sup>120</sup> WL McNair, AA Mocatta op cit note 40 at footnote 32.

<sup>121</sup> Comité Maritime International ‘The Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules’ op cit note 42.

<sup>122</sup> BJ Davenport op cit note 83 at 523. According to Hare, in the instances where there is ambiguity in the Rules, due regard should be given to the *Travaux Préparatoires*... ‘to determine the rationale behind the words of the Rules in an attempt to distil meaning from obscurity’. See J Hare op cit note 41 at 652.

<sup>123</sup> BJ Davenport op cit note 83 at 523.

<sup>124</sup> Hirst J in the *Captain Gregos* held that if he is found to be incorrect in his judgment regarding the applicability of the Rules to claims for misdelivered cargo, and where it is appropriate to do so, then he recognises the legislative intention of the sub-committee members at the Stockholm Conference as stated in *The Captain Gregos* supra note 30 at 69.

<sup>125</sup> A Diamond op cit note 119 at 256.

<sup>126</sup> WL McNair, AA Mocatta op cit note 40 at footnote 32.

<sup>127</sup> M Mustill ‘Carriage of Goods by Sea Act 1971’ (1972) 11 *Arkiv Sjorett* 684; WL McNair, AA Mocatta op cit note 40.

<sup>128</sup> Notably, Hirst J considered Professor Diamond’s counter views to be ‘hesitant and tentative’ in *The Captain Gregos* supra note 30 at 69.

<sup>129</sup> A Diamond op cit note 119 at 256.

<sup>130</sup> The inclusion of the word ‘whatsoever’ in Art III, r 6 was intentional; however, notably it was not included in any of the other limitation provisions which refer to ‘loss or damage’, such as, art III rules 5 and 8, and Art IV rules 1 and 2. This observation was made by the late Mr Michael Mustill, QC and quoted by Hirst J in *The Captain Gregos* supra note 30 at 68. According to Mr Michael Mustill, QC, the intention behind the exclusion is apparently to allow for the limit to apply to deviations. However, there is no evidence

respect of the goods, unless suit is brought within one year of their delivery or the date when they should have been delivered.’<sup>131</sup>

The new wording was considered for the first time in the *Captain Gregos* and was held by the Court of Appeal to mean ‘exactly what it says.’<sup>132</sup> According to Bingham J in the *Captain Gregos*, the time bar applies to claims arising out of the ‘carriage or miscarriage of goods by sea’.<sup>133</sup>

The purpose of a time bar is to achieve finality.<sup>134</sup> Therefore, the exclusion of misdelivery claims from the time-bar provision would ‘seriously’ undermine its purpose.<sup>135</sup> Moreover, unlike some of the other limitation and exception provisions<sup>136</sup> contained in the Rules, article III, rule 6 does not expressly deny the carrier the right to rely on the time bar in instances where it is guilty of ‘wilful or reckless misconduct’.<sup>137</sup>

There are both academic<sup>138</sup> and judicial opinions<sup>139</sup> to support the notion that the inclusion of the words ‘in respect of the goods’ has further extended the time bar provision to include claims for damage or loss to the cargo to claims that arise from a fundamental breach of the Rules by the carrier<sup>140</sup> and claims arising after the discharge of the goods.<sup>141</sup> Therefore, the time-bar provision as provided for in the Rules will be applicable ‘in every case’.<sup>142</sup> That is, a claim under the Rules will be subject to the time bar provision irrespective of the seriousness of the contractual breach by the carrier. Furthermore, the operation of the time bar

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supporting the argument that this was the intention of the sub-committee as read at A Diamond op cit note 119 at footnote 88.

<sup>131</sup> According to Bingham J in *The Captain Gregos* the drafters of the Rules used very empathetic wording in this provision supra note 20 at 315.

<sup>132</sup> *The Captain Gregos* supra note 20 at 315.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

<sup>135</sup> *The Alhani* supra note 24 at 572.

<sup>136</sup> Such as art IV, r 5(e) which provides that if damage to the goods is caused by wilful or reckless misconduct the shipowner loses the benefit of the financial limitation; and art IV (art IV bis, r 4) which provides that if a servant or agent of the carrier damages the goods by wilful or reckless misconduct he cannot rely on the said provision.

<sup>137</sup> *The Captain Gregos* supra note 20 at 316; Tetley likewise notes that the time bar provision in The Hague-Visby Rules does not contain a provision which is equated to a common law ‘fundamental breach’ provision as read at GH Treitel, FMB Reynolds & TG Carver op cit note 2 at 743.

<sup>138</sup> JF Wilson op cit note 8; R Aikens, R Lord & M Bools op cit note 32.

<sup>139</sup> *Kenya Railways v Antares Co. Pte Ltd (The ‘Antares’)* (NOS 1 and 2) [1987] 1 Lloyd’s Rep. 424; *The Zhi Jiang Kou* supra note 33 at 493.

<sup>140</sup> JF Wilson op cit note 8 at 205.

<sup>141</sup> R Aikens, R Lord & M Bools op cit note 32 at 517 – 518.

<sup>142</sup> *The Kapitan Petko Voivoda* supra note 113 at 13.

will not be restricted to claims arising within the period of responsibility<sup>143</sup> that is before discharge.

### 3.5 *The package limitation*

The carrier's right to limit its liability in respect of cargo claims by third parties originated in the 17<sup>th</sup> century,<sup>144</sup> mainly to encourage merchants to invest in shipping.<sup>145</sup> Furthermore, it serves to protect both the carrier and the shipper. On the one hand, it protects the carrier from a shipper failing to disclose the true value of the cargo; and on the other hand, it protects the shipper from the carrier limiting its liability to a minimal amount.<sup>146</sup> Consequently, a package limitation provision was incorporated into both the 1924 Rules and the Rules. Article IV, rule 5(a) of the Rules provides as follows:

‘Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding [666.67 units of account] per package or unit or [2 units of account per kilogramme] of gross weight of the goods lost or damaged, whichever is the higher.’

It is contended that the package limitation provision will not apply to claims for misdelivery which occur post-discharge, unless the parties have extended the period in the contract of carriage.<sup>147</sup>

#### 3.5.1 *The scope of the package limitation provided under the Rules*

The English Commercial Court in the *MSC Amsterdam*<sup>148</sup> had to decide whether the carrier was entitled to limit its monetary liability for conversion<sup>149</sup> of the cargo during the post-discharge period. Counsel on behalf of the carrier maintained that article IV, rule 5(a) was broad enough to include claims for misdelivery since, like the time-bar provision,<sup>150</sup> this

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<sup>143</sup> [2018] 2 Lloyd's Rep. 563 at 578.

<sup>144</sup> P Griggs 'Limitation of liability for maritime claims: the search for international uniformity' 1997 *LMCLQ* 370.

<sup>145</sup> JF Wilson op cit note 8 at 195; R Aikens, R Lord & M Bools op cit note 32 at 195.

<sup>146</sup> It is also beneficial to shippers in that the carrier will be able to offer 'uniform' and more cost effective freight rates as read at JF Wilson op cit note 8 at 195; R Aikens, R Lord & M Bools op cit note 32 at 195.

<sup>147</sup> R Aikens, R Lord & M Bools op cit note 32 at 561.

<sup>148</sup> *The MSC Amsterdam* supra note 61.

<sup>149</sup> Conversion is a type of tort, and is the modern term for trover. That is, to unlawfully deprive a person of his property by disposing of it as stated by F Arizon, D Semark *Maritime Letters of Indemnity* (2014) 85.

<sup>150</sup> The wording in art III, r 6 is stronger than that of art IV, r 5(a) since the former discharges the carrier and the ship 'from all liability whatsoever in respect of the goods...'; See P Todd op cit note 11 at 224.

provision also included the phrase ‘in any event’.<sup>151</sup> Aikens J agreed *obiter* with the carrier’s counsel that the wording of article IV, rule 5(a) was wide enough to include claims for misdelivery. However, this conclusion was reached, on the presumption that the Rules applied to claims which arise post-discharge.<sup>152</sup>

Accordingly, a carrier has a duty in terms of the wording article III (2) of the rules to ‘keep and care’ for the cargo. If the parties agree to the Rules applying post-discharge then this duty will also exist throughout that period. A carrier will be in breach of this duty if it gives up custody of the cargo to a consignee who is not entitled thereto. Notwithstanding this ‘very serious breach’,<sup>153</sup> the phrase ‘in any event’ is wide enough to encompass a claim for misdelivery since it relates to every case.<sup>154</sup> Consequently, Aikens J found that:

‘The shipowner’s liability must be limited if his liability for misdelivery is one for “. . . loss or damage . . . in connection with the goods”. To my mind a shipowner’s liability to the cargo owner, whether in contract or conversion, for loss suffered by the latter as a result of misdelivery of the cargo by the shipowner, is obviously a liability for “. . . loss in connection with the goods”.’<sup>155</sup>

The *MSC Amsterdam* was taken on appeal, but the Court of Appeal found it unnecessary to consider the question of whether the limitation provision would apply if the misdelivery occurred during the period of responsibility in terms of article II of the rules.<sup>156</sup> Therefore, the lack of judicial authority makes it difficult to draw a clear conclusion on the point.<sup>157</sup> Notwithstanding the uncertainty surrounding the scope of article IV, rule 5(a), the Rules contain a further provision which sets forth the elements of misconduct which will exclude a carrier from relying on the package limitation provision.

### 3.5.2 *Conduct excluding reliance on the package limitation provision*

A carrier might lose its right to limit its liability for misdelivery claims under the Rules given the contents of article IV, rule 5(e),<sup>158</sup> which provides as follows:

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<sup>151</sup> *The MSC Amsterdam* supra note 61 par 102.

<sup>152</sup> *The MSC Amsterdam* supra note 61 par 107.

<sup>153</sup> Misdelivery is perhaps regarded as more serious than a breach for carriage of cargo on deck or a breach of the obligation to provide a seaworthy vessel as suggested by P Todd op cit note 11 at 224.

<sup>154</sup> *The MSC Amsterdam* supra note 61 par 106.

<sup>155</sup> *Ibid.*

<sup>156</sup> *The MSC Amsterdam* supra note 59 at 629.

<sup>157</sup> P Todd op cit note 11 at 225.

<sup>158</sup> DR Thomas *The Carriage of Goods by Sea under the Rotterdam Rules* 2 ed (2014) at paragraph 9.22.

‘Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.’<sup>159</sup>

Article IV, rule 5(e) places a heavy burden on a cargo claimant<sup>160</sup> who wishes to challenge a carrier or shipowner’s right to rely on the limitation provision. A cargo claimant has to prove that the carrier had the intent to cause damage, acted recklessly and with the knowledge that the relevant loss would occur as the result of the said carrier or shipowner.<sup>161</sup>

One academic argument is that the delivery of cargo without the production of a bill of lading is a ‘reckless act done with knowledge’.<sup>162</sup> However, there is no notable case law considering this particular point. Therefore, in order to determine whether a carrier has acted recklessly and with knowledge in the said circumstances, the terms ‘recklessly’ and ‘knowledge’ have to be construed.<sup>163</sup> English Courts<sup>164</sup> have interpreted the word ‘recklessly’ to mean ‘carelessness’. It also denotes a ‘subjective realisation by the carrier that something is being done wrong, together with indifference as to the consequences’.<sup>165</sup> The subjective requirement is further supported by the requirement of knowledge that damage will probably result.<sup>166</sup> In construing the word ‘recklessly’ it is important to also consider the subsequent phrase ‘and knowledge that damage would probably result’.<sup>167</sup>

It is noted that reference is made to a probability as opposed to a possibility of damage resulting.<sup>168</sup> Hence, something more than a possibility is required. Accordingly, the word

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<sup>159</sup> This provision is said to be based on art 25 of The Hague Protocol to the Warsaw Convention 1955 (with a few differences, for example to the Hague-Visby Rules which merely refers to the ‘carrier’ whereas the Warsaw Convention refers to ‘carrier, his servants or agents’ as read at A Diamond op cit note 119 at 244. For a discussion on all the noted differences between the wording in art IV, r 5(e) of the Hague-Visby Rules and art 25 of the Hague Protocol to the Warsaw Convention 1955 see P Griggs op cit note 144 at 33 – 39.

<sup>160</sup> M Katsivela ‘Loss of the Carrier’s Limitation of Liability under the Hague-Visby Rules and the Warsaw Convention: Common Law and Civil Law Views’ (2012) 26 *Austl. & N.Z. Mar. L.J.* 121.

<sup>161</sup> The authors of P Griggs op cit note 144 at 37 cites the case of *MSC Mediterranean Shipping Co. S.A. v Delumar BVBA and Others (The ‘MSC Rosa M’)* [2000] 2 Lloyd’s Rep. 399 at 401.

<sup>162</sup> DR Thomas op cit note 158 at para 9.22.

<sup>163</sup> In light of the fact that both the Hague-Visby Rules and the Hague Protocol to the Warsaw Convention 1955 contain a similar worded provision, it is appropriate to consider case law which has interpreted art 25 of the Hague Protocol since it constitutes a ‘valid source of inspiration and guidance’ for considering art IV, r 5(e) of the Hague-Visby Rules as read at M Katsivela op cit note 160 at 119.

<sup>164</sup> The author of P Griggs op cit note 144 at 37 cite the cases of *R v Caldwell* [1982] A.C. 354 and *R v Lawrence (Stephen)* [1982] A.C. 520.

<sup>165</sup> A Diamond op cit note 119 at 245.

<sup>166</sup> Ibid.

<sup>167</sup> The English Court of Appeal in *Goldman v Thai Airways* [1983] 3 All E.R. 693 emphasised that the word ‘recklessly’ has to be interpreted in conjunction with the phrase ‘and with knowledge that damage would probably result’ as read at P Griggs op cit note 144 at 38.

<sup>168</sup> *Goldman v Thai Airways* [1983] 3 All E.R. 693 at 700.



‘probably’ signifies that ‘something is likely to happen’.<sup>169</sup> This requirement therefore, protects the carrier since it is a more stringent requirement than merely establishing the possibility of damage.<sup>170</sup>

The type of knowledge which is required has been held to be ‘actual’ knowledge<sup>171</sup> and not imputed knowledge.<sup>172</sup> Therefore, a subjective test rather than an objective test falls to be applied<sup>173</sup> to determine whether a carrier appreciates or is aware<sup>174</sup> of the probable consequence (that is, damages resulting from the said misdelivery) of delivering cargo to a consignee without the production of the bill of lading. The subjective test greatly benefits the carrier since a claimant has the onerous task<sup>175</sup> of establishing actual knowledge on the part of the carrier that damage would probably result.<sup>176</sup> Whether a carrier’s actions amount to misconduct in terms of article IV, rule 5(e) will be determined in light of either direct evidence or inferences drawn from the facts of the case.<sup>177</sup>

### 3.6 Conclusion

It is clear from the above discussion that the issue surrounding the applicability of the Rules to claims arising post-discharge remains unsettled. Nonetheless, prominent legal authors<sup>178</sup> conclude that the Rules do not apply to claims arising post-discharge. However, the point will remain open until a conclusive verdict is reached by the Court of Appeal. Notwithstanding the uncertainty, it may be argued in light of the amended time-bar provision and the judicial and academic opinions discussed above, that a carrier will be able to rely on the time-bar provision as a defence against a cargo owner’s claim for misdelivered cargo. It is, however, not clear whether the limitation provision will be applicable to claims for misdelivery of cargo resulting from the non-production of the bill of lading.

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<sup>169</sup> Ibid.

<sup>170</sup> M Katsivela op cit note 160 at 120.

<sup>171</sup> P Griggs op cit note 144 at 38.

<sup>172</sup> JF Wilson op cit at 204.

<sup>173</sup> M Katsivela op cit note 160 at 120.

<sup>174</sup> *Nugent and Killick v Michael Goss Aviation Ltd.* [2000] 2 Lloyd’s Rep. 222 at 226.

<sup>175</sup> There is notably only one instance in which a cargo insurer successfully relied on art IV, r 5(e) of the Hague-Visby Rules to break the limitation, namely *Kairos Shipping Ltd and Another v Enka & Co LLC and Others (The ‘Atlantik Confidence’)* [2016] EWHC 2412 in which the loss of the vessel and its cargo was caused by the ‘personal act or omission’ of the ship owners whose crew deliberately set a fire and deliberately caused the [ship] to sink’ as read at R Butler, A Kemp, J Salmon ‘Atlantik Confidence: Cargo Insurers “Break Limits” in unprecedented judgment’ *HFW* October 2016, available at <http://www.hfw.com/ATLANTIK-CONFIDENCE-Cargo-Insurers-break-limits-in-unprecedented-judgment-October-2016>, accessed on 16 June 2018.

<sup>176</sup> M Katsivela op cit note 160 at 120.

<sup>177</sup> Ibid at 122.

<sup>178</sup> This conclusion is based on the views of Aikens, Reynolds and Tetley.

Unlike the time-bar provision, the limitation provision does not expressly make reference to ‘delivery’. Therefore, the crux of the matter is that the Rules do not apply post-discharge unless the parties have agreed thereto in the contract of carriage.<sup>179</sup> Nevertheless, should a court find that the limitation provision applies to misdelivery claims, the carrier might still be excluded from relying on the limitation provision by virtue of article IV, rule 5(e). The cargo claimant bears the heavy onus of proof and since a subjective test is applied, it is questionable whether the claimant will be successful in its endeavours to prevent a carrier from relying on the limitation provision.

In conclusion, the delivery of cargo without the production of the bill of lading and the subsequent misdelivery of the cargo has been held to be ‘a very serious breach of duty, about as serious as there could be’<sup>180</sup> the consequences of which are dire. Therefore, it would be more advantageous for carriers to avoid the consequences of misdelivery than to try and cure it *ex post facto*. One such preventative method is to request a letter of indemnity from the consignee demanding delivery. The viability of letters of indemnity will be examined in Chapter 4.

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<sup>179</sup> R Aikens, R Lord & M Bools op cit note 32 at 561.

<sup>180</sup> *The MSC Amsterdam* supra note 61 par 106.

## CHAPTER 4

### THE ENFORCEABILITY OF THE MARITIME LETTER OF INDEMNITY<sup>1</sup>

#### 4.1 Introduction

Following on from the stringent legal consequences faced by carriers for the non-production of the bill of lading, a practice has developed where carriers now opt to deliver cargo against letters of indemnity (LOIs) in lieu of bills of lading. The delivery of the cargo against an LOI is arguably in direct conflict with the presentation rule<sup>2</sup> and exposes the carrier and the rightful owner of the cargo to various risks. Amongst these risks is the non-enforceability of the LOI by the courts.<sup>3</sup>

Notwithstanding the risks associated with the use of LOIs, carriers will continue to use them as a tool to combat the practical difficulties<sup>4</sup> created by the presentation rule<sup>5</sup> and for the ‘commercial flexibility’ they provide.<sup>6</sup> Some carriers are nevertheless ignorant of the legal consequences associated with the use of LOIs.<sup>7</sup> The ignorance is due to the fact that the legal implications surrounding the use of LOIs are still under scrutiny.<sup>8</sup> Moreover, the terms of LOIs are for the most part not regulated by international conventions<sup>9</sup> that is, neither The Hague nor The Hague-Visby Rules make provision for LOIs.<sup>10</sup> Therefore, the validity of LOIs is

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<sup>1</sup> The maritime LOI is most frequently used by traders to enable the delivery of the cargo without the presentation of the bill of lading according to F Arizon, D Semark *Maritime Letters of Indemnity* (2014) 1.

<sup>2</sup> Ibid.

<sup>3</sup> According to the authors of *Maritime Letters of Indemnity* op cit note 1 at 2, there is a general concern among shipowners that LOIs are unenforceable.

<sup>4</sup> These difficulties were noted in *Enichem Anic S.p.A. and Others v Ampelos Shipping Co. Ltd (The ‘Delfini’)* [1990] 1 Lloyd’s Rep. 252 at 257 ‘... in the modern conditions prevailing in the shipment [of bulk cargo] and where there is a string of sellers and buyers and a short journey between loading and delivery it is frequently the case that the ship arrives at the port of discharge before any of the shipping documents, including the original bill of lading, find their way down the chain into the hands of the ultimate purchaser to whom the delivery of the cargo is to be made. Thus it is that the procedure of issuing letters of indemnity...has grown up so as to enable the discharge of the cargo to take place with expedition and to avoid delaying the ship until the arrival of the formal documents’.

<sup>5</sup> F Arizon, D Semark op cit note 1 at 84 – 85.

<sup>6</sup> R Williams ‘Letters of Indemnity’ (2009) 15(5) *JIML* 395.

<sup>7</sup> F Arizon, D Semark op cit note 1 at 1.

<sup>8</sup> The use of LOIs sometimes bring unexpected results as read at F Arizon, D Semark op cit note 1 at 1.

<sup>9</sup> R Williams op cit note 6 at 394.

<sup>10</sup> The late Professor Tetley argued that ‘the courts’ treatment of the letter of indemnity has resulted in the carrier suffering excessive hardship beyond the intention and spirit of the [International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (‘Hague Rules’) 1924 and The Hague Rules as

determined by municipal law and the enforceability thereof can vary from one legal jurisdiction to another.<sup>11</sup>

This chapter will first discuss the general notion and function of LOIs, followed by an examination of various legal aspects relating to the enforceability of the LOI. Thereafter, recent English judicial decisions will be considered to highlight the issues that have arisen from the use of standard LOIs.

## 4.2 *Delivery of cargo against an LOI*

### 4.2.1 *The general notion of an LOI*

It is common for bills of lading, sales contracts and charterparties<sup>12</sup> to contain a clause that makes provision for carriers to deliver cargo against an LOI or bank guarantee<sup>13</sup> in lieu of the original bill of lading where the bill is not available at the time of discharge.<sup>14</sup> Therefore, LOIs are used to ‘expedite the discharge of the cargo and to avoid delaying the ship’<sup>15</sup> that could result in the carrier being liable for demurrage charges and storage costs.<sup>16</sup> A carrier that accepts an LOI is not absolved from liability.<sup>17</sup> The LOI merely serves as an undertaking by the party

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amended by the Brussels Protocol (‘Hague-Visby Rules’) 1968]: See W Tetley ‘Letters of Indemnity: Should they be Tolerated’ (1977) 23 *McGill L. J.* 671.

<sup>11</sup> W Tetley op cit note 10 at 670.

<sup>12</sup> F Arizon, D Semark op cit note 1 at 14.

<sup>13</sup> LOIs are commonly mistaken for letters of guarantee amongst the mercantile community and some legal authors such as the late Professor Tetley insists that ‘a letter of guarantee given at the discharge and delivery by a consignee who is unable to surrender the original bill of lading ... is not a letter of indemnity but rather a security of suretyship agreement’ as read at W Tetley *Marine Cargo Claims* 3 ed (1927) 822. However, there are clear differences between a contract of indemnity and a contract of guarantee. These differences are that ‘a contract of indemnity gives rise to a primary obligation; there are only two parties to a contract of indemnity; the indemnity is a promise to indemnify a debtor; it is owed to the debtor only and not because he has failed to perform his obligation, but rather because he has performed’ it as read at F Arizon, D Semark op cit note 1 at 6.

<sup>14</sup> A Robinson, P Lamb ‘Letters of Indemnity’ *LexisNexis*, available at <https://0-www-mylexisnexis-co-za.oasis.unisa.ac.za/Index.aspx#>, accessed on 2 October 2019.

<sup>15</sup> SF Du Toit *The Bill of Lading in South African Law* (unpublished LLM thesis, the University of Johannesburg, 2000) 184.

<sup>16</sup> C Proctor *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document in Financing International Sale Contracts* (unpublished LLM dissertation, the University of South Africa, 1996) 83.

<sup>17</sup> JF Wilson *Carriage of Goods by Sea* 7 ed (1988) 157. It is noted by the author of *The Bill of Lading in South African Law* (unpublished LLM thesis, the University of Johannesburg, 2000) that the indemnity given to the carrier ‘does not in some magical way do away with the serious breach of contract’. He further cites the *Kuwait Petroleum Corp v I & D Oil Carriers (The ‘Houda’)* [1994] 2 Lloyd’s Rep. 541 in which Leggatt LJ noted that ‘[I]n default of production of the bill of lading an indemnity is afforded to the shipowner not on account of the lawfulness of the order to deliver but to protect him if he does what he is *not* contractually obliged to do.’

providing it to indemnify the carrier in respect of any liability for<sup>18</sup> loss or damage it may sustain<sup>19</sup> as a result of a claim by the lawful holders of the bills of lading.<sup>20</sup>

Generally, the undertaking may further include terms that the original bills of lading be delivered to the carrier as soon as they come to hand,<sup>21</sup> setting the financial limit of the LOI<sup>22</sup> and the time period after which it will lapse.<sup>23</sup> The carrier may either accept a personal indemnity or it may insist that the LOI be co-signed by a bank. On the one hand, the latter is a more sound option for the carrier since a personal indemnity will only be as good as the financial standing of the indemnifier.<sup>24</sup> On the other hand, a personal indemnity may be preferable to the indemnifier because banks may charge hefty fees for signing LOIs.<sup>25</sup>

#### 4.2.2 *The function of an LOI*

A LOI is described as follows:

‘[A]n enforceable promise made by A [the receiver of the cargo] to B [the beneficiary] to hold B harmless against any liability, loss or damage that B incurs as a result of complying with a request made by A.’<sup>26</sup>

From a shipping perspective, it is normally the carrier who is the beneficiary of the LOI.<sup>27</sup> The party who provides the carrier with a LOI is usually the shipper, the charterer or the person receiving the cargo.<sup>28</sup> A LOI is a binding contract of indemnity<sup>29</sup> between a carrier and the

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<sup>18</sup> It is anticipated that the carrier will be liable to the lawful holder of the bill of lading if it delivers the cargo without the production of the bill of lading since this is contrary to its obligations in terms of the bill of lading contract as read at A Robinson, P Lamb ‘Letters of Indemnity’ *LexisNexis*, available at <https://0-www-mylexisnexis-co-za.oasis.unisa.ac.za/Index.aspx#>, accessed on 2 October 2019.

<sup>19</sup> Č Pejović ‘Legal Issues Arising from Delivery of Goods without a Bill of Lading: Case Study of Some Asian Jurisdictions’ (2006) 45(160) *PPP god* 18.

<sup>20</sup> F Arizon, D Semark op cit note 1 at 109.

<sup>21</sup> Č Pejović op cit note 19 at 18.

<sup>22</sup> The financial limit should preferably make provision for the ‘value of the cargo and other incidental costs such as legal fees’ as stated by SF Du Toit op cit note 15 at 184.

<sup>23</sup> Ibid.

<sup>24</sup> JF Wilson op cit note 17 at footnote 225.

<sup>25</sup> Č Pejović op cit note 19 at 18.

<sup>26</sup> R Williams op cit note 6 at 394.

<sup>27</sup> It could also be a demise or time charterer who is requested to give a letter of indemnity: F Arizon, D Semark op cit note 1 at 1 – 2.

<sup>28</sup> F Arizon, D Semark op cit note 1 at 2.

<sup>29</sup> Ibid. A ‘contract of indemnity’ in English law is described as ‘a primary obligation of one party to make good for loss suffered by another party. That obligation may not be the consequence of a contract at all, but may instead be based on some other legal principle and arise by operation of law. For these purposes, a contract of indemnity is a contract between a promiser (the indemnifier) and a creditor who is owed money by a third party (the principal debtor)’.

indemnifier.<sup>30</sup> The LOI contract is separate from the underlying contract.<sup>31</sup> The terms of the LOI and that of the underlying contract may vary<sup>32</sup> and the enforceability of the former and the latter will be determined separately.<sup>33</sup>

A LOI will be interpreted in the same way as any other contract.<sup>34</sup> However, the terms of a contract of indemnity are expressly conditional or will be interpreted as such.<sup>35</sup> That is, the party furnishing the indemnity does so on the condition that the carrier delivers the cargo according to the terms of the indemnity. One such term is that the carrier delivers to the party named in the LOI.<sup>36</sup> Should the carrier fail to deliver to the named party then the indemnifier will not be contractually obligated to indemnify it against any subsequent claims.<sup>37</sup>

#### 4.2.3 *A carrier's obligation to deliver cargo against a LOI*

Subject to any contractual clause to the contrary,<sup>38</sup> a carrier or shipowner is not bound by a contractual clause providing for the delivery of cargo against an LOI.<sup>39</sup> An example of a contractual clause which requests rather than requires the carrier to deliver the cargo against a LOI is as follows:

‘Charterers hereby indemnify Owners against all consequences or liabilities . . . [ . . . delivery of cargo without presentation of Bills of Lading] . . . Letter of Indemnity to Owners’ P&I Club wording to be incorporated in this Charter-Party . . .’<sup>40</sup>

The abovementioned clause will only come into effect if the carrier elects to deliver the cargo without the production of the bill of lading.<sup>41</sup> The apparent purpose of such a clause is to protect the carrier against the consequences of evading the presentation rule.<sup>42</sup> An example of an ‘obligatory clause’ is as follows:

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<sup>30</sup> F Arizon, D Semark op cit note 1 at 1.

<sup>31</sup> R Williams op cit note 6 at 395.

<sup>32</sup> For example, the LOI may vary from the underlying contract in respect of the choice of law governing the contract if there is a dispute. It is advised that the LOI contract’s choice of law clause should be determined according to the law which normally governs the indemnifying bank rather than the law that governs the contract of sale or contract of carriage. See SF Du Toit op cit note 15 at 184.

<sup>33</sup> R Williams op cit note 6 at 395.

<sup>34</sup> R Aikens, R Lord & M Bools *Bills of Lading* 2 ed (2015) 265.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> JF Wilson op cit note 17 at footnote 225.

<sup>39</sup> Č Pejović op cit note 19 at 18.

<sup>40</sup> This clause is from an amended Shelltime 4 Form and was the subject of dispute in *The Houda* supra note 17 as cited by P Todd *Principles of the Carriage of Goods by Sea* ( 2016) 217.

<sup>41</sup> SF Du Toit op cit note 15 at 186.

<sup>42</sup> Č Pejović op cit note 19 cites the *The Houda* supra note 17 in support of this argument.

‘In the event that original Bill[s] of Lading are not at discharge port in time for vessel’s discharge, then Owners to agree to discharge of the cargo against production of a Bank Guarantee.’<sup>43</sup>

Another example of such an obligatory clause can be found in *The Delfini*.<sup>44</sup> The clause subject to dispute in that case reads as follows:

‘Should Bills of Lading not arrive at the discharge port in time then Owners agree to release the entire cargo without presentation of the original Bills of Lading against delivery by Charterers of [LOIs] . . . which [LOI] shall be limited to deal exclusively with all claims of holders of original Bill(s) of Lading in relation to discharge of cargo without presentation of original Bills of Lading and shall automatically become null and void against presentation of 1 out of 3 original Bills of Lading, or after 13 months after completion of discharge whichever occurs first . . . ’.<sup>45</sup>

Any clause that imposes an unlawful obligation on a carrier will not be enforceable against the said carrier.<sup>46</sup> Furthermore, whilst the delivery of cargo against a LOI is a recognised custom amongst traders, it is not part of the ‘general merchant law’.<sup>47</sup>

#### 4.2.4 *The period of enforceability of an LOI*

The period of enforceability of a LOI is subject to various considerations. One such is the competing interests of the parties to the indemnity contract. The indemnifier who pays a fee to a bank or guarantor to supply the security would prefer to be released from such liability as soon as possible,<sup>48</sup> while it would be more beneficial for the receiver of the LOI to remain indemnified for as long as possible in case any future claims are instituted against it.<sup>49</sup>

The other aspect to consider is the proper law of the underlying contract. Where the contract of carriage is regulated by English law,<sup>50</sup> South African law,<sup>51</sup> or is subject to the Hague or Hague-Visby Rules’ time bar,<sup>52</sup> the carrier’s period of liability will be six, three or

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<sup>43</sup> This example is from *SA Sucre Export v Northern River Shipping Co Ltd (The ‘Sormovskiy 3068’)* [1994] 2 Lloyd’s Rep. 266 as cited by SF Du Toit op cit note 15 at 187.

<sup>44</sup> *The Delfini* supra note 4 as cited by SF Du Toit op cit note 15 at 187.

<sup>45</sup> This type of clause is regularly used by oil merchants and it is advisable that shipowners, when using such a clause in a charterparty, do so cautiously and only with traders with the same financial standing as an oil merchant as read at R Williams op cit note 6 at 401.

<sup>46</sup> Č Pejović op cit note 19 at 18.

<sup>47</sup> *Herman Carlberg v Wemyss Coal Co. Ltd* [1915] S.C. 616 at 624.

<sup>48</sup> R Williams op cit note 6 at 410.

<sup>49</sup> Ibid.

<sup>50</sup> Limitation Act 1980.

<sup>51</sup> Prescription Act 68 of 1969.

<sup>52</sup> Article III, Rule 6.

one year, respectively. The carrier will be at risk for possible misdelivery claims by the true owner of the cargo for up to six years, depending on the applicable period of prescription.

Furthermore, the proper law of the indemnity contract also has to be considered since the period of prescription may vary on that account. A cause of action in respect of a LOI arises when the liability of a carrier is established;<sup>53</sup> that is, once the carrier's liability is determined in terms of the underlying contract, it then has six years in terms of English law and three years in terms of South African law to institute proceedings on the indemnity contract.<sup>54</sup> Therefore, the carrier as the beneficiary of the indemnity contract has to consider the various prescriptive periods and time bars that it might face in order to determine the period in which the LOI may be enforced.

### 4.3 *The risks associated with the use of LOIs*

The use of LOIs may have the following consequences for carriers:

#### 4.3.1 *Possible forfeiture of Protection and Indemnity Insurance (P&I) cover*

The International Group of P&I Clubs have introduced a rule<sup>55</sup> that the carrier will not *per se* be covered for liabilities, costs or expenses arising from subsequent claims for misdelivery resulting from the use of LOIs.<sup>56</sup> However, this rule is subject to instances where prior approval has not been granted by the P&I Club.<sup>57</sup>

#### 4.3.2 *Increased risk of third party claims*

Generally, the shipowner will not have any dealings with the person to whom the charterer requests it to make delivery in terms of the LOI.<sup>58</sup> This increases the chances of the shipowner misdelivering the cargo. Moreover, it increases the carrier's risk of being exposed to a claim by a third party alleging to be the rightful owner of the cargo.<sup>59</sup> In such instances the carrier

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<sup>53</sup> A Mitchelhill *Bills of Lading: Law and Practice* 2 ed (1990) 61.

<sup>54</sup> Indemnity contracts are not regulated by The Hague or Hague-Visby Rules since these conventions only apply to contracts of carriage. Therefore, the indemnity contract is not subject to the time bar provided for by the Rules according to W Tetley op cit note 13 at 836.

<sup>55</sup> R Williams op cit note 6 at 398.

<sup>56</sup> B Kirrane 'The Risks of Letters of Indemnity' *Steamship Mutual* January 2017, available at <https://www.steamshipmutual.com/publications/Articles/riskiflettersindemnity.htm>, accessed on 17 October 2019.

<sup>57</sup> J Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed (1999) footnote 18 at 577.

<sup>58</sup> *Farenco Shipping Co Ltd v Daebo Shipping Co Ltd (The 'Bremen Max')* [2009] 1 Lloyd's Rep. 81 at 87.

<sup>59</sup> *Hellenic Shipping* 'Letters of Indemnity (LOIs) and recent English Court decisions' 11 February 2019, available at <https://www.hellenicshippingnews.com/letters-of-indemnity-lois-and-recent-english-court-decisions/>, accessed on 17 October 2019.



may be held liable for the full value of the cargo and its ship may be arrested to enforce such a claim.<sup>60</sup>

#### *4.3.3 Difficulties enforcing LOIs*

The following factors will contribute to a carrier having difficulties enforcing LOIs:<sup>61</sup>

- i. The indemnifier might become insolvent subsequent to the delivery of the cargo.
- ii. The carrier's claim under the indemnity contract prescribes.
- iii. The shipowner has not complied with the prescribed manner of delivery in terms of the LOI.
- iv. A court refuses to enforce the LOI on the grounds of illegality and public policy.

The court's refusal to enforce LOIs will be considered in more depth in the section to follow.

#### *4.4 The enforceability of LOIs*

The enforceability of LOIs is questionable.<sup>62</sup> On the one hand, it is argued by Professor Hare that a carrier will have difficulty enforcing LOIs even where it acts in good faith.<sup>63</sup> On the other hand, it is argued by other legal academics that a carrier will only have difficulty enforcing an LOI where fraud is committed.<sup>64</sup>

##### *4.4.1 Enforceability under South African Admiralty law*

In terms of section 7(2)(a) of the Admiralty Jurisdiction Regulation Act (AJRA),<sup>65</sup> all maritime claims shall be heard by the High Court exercising its admiralty jurisdiction.<sup>66</sup> That is, if a claim is considered to be a maritime claim, it will fall exclusively within the High Court's jurisdiction.<sup>67</sup> Therefore, the question is whether a claim arising out of the enforcement of an indemnity is considered to be a maritime claim. In terms of section 1(1)(h) of AJRA<sup>68</sup> a

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<sup>60</sup> C Proctor op cit note 16 at 87.

<sup>61</sup> R Williams op cit note 6 at 407.

<sup>62</sup> SF Du Toit op cit note 15 at 187.

<sup>63</sup> J Hare op cit note 57 at 577.

<sup>64</sup> C Proctor op cit note 16 at 53; H Staniland 'Can an Indemnity Issued in Consideration for a Misrepresentation in a Bill of Lading Be Enforced in the Admiralty Court' (1988) 105 *SALJ*. 322.

<sup>65</sup> 105 of 1983.

<sup>66</sup> Section 2(1) of AJRA vests within the High Court of South Africa the jurisdiction to hear and determine any maritime claim as read at J Hare op cit note 57 at 16.

<sup>67</sup> H Staniland op cit note 64 at 323.

<sup>68</sup> 105 of 1983.

‘maritime claim means any claim arising out of the carriage of goods in a ship, or any agreement for or relating to such carriage’. According to Professor Staniland, the wording of this provision is wide enough to include an indemnity claim.<sup>69</sup> More specifically, section 1(1)(ff) of AJRA provides that a maritime claim includes:

‘any contribution, *indemnity* or damages with regard to or arising out of any claim in respect of any matter mentioned above or any matter ancillary thereto, including the attachment of property to found or confirm jurisdiction, the giving or release of any security, and the payment of interest.’ (author’s own emphasis)

Section 1(1)(h) read with section 1(1)(ff) of AJRA clearly vests exclusive jurisdiction in the High Court to hear indemnity claims.<sup>70</sup> Furthermore, the law to be applied in the High Court is governed by section 6 of AJRA.<sup>71</sup> However, section 6 is subject to there not being any prevailing South African statutes regulating the claim.<sup>72</sup>

Section 6(1) of the AJRA provides for English law to be applied in certain circumstances and Roman-Dutch law in others:<sup>73</sup>

‘... a court in the exercise of its admiralty jurisdiction shall-

(a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied; . . .

(b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic.’

The parties to a contract may in terms of section 6(5) of AJRA agree to either English or Roman-Dutch law being applicable to the contract.<sup>74</sup> However, where there is no such agreement an inquiry has to be undertaken to determine whether the Colonial Court of

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<sup>69</sup> H Staniland op cit note 64 at 323.

<sup>70</sup> Ibid. It should be noted that Professor Staniland, wrote this article before the 1992 amendments to AJRA which inserted sub-subparagraph 1(1)(ff), and he relied on the wording of the previously numbered s 1(1)(ii)(y), which referred to indemnity claims in slightly more restrictive terms.

<sup>71</sup> Ibid. Professor Staniland correctly points out that this is a ‘somewhat controversial’ section. The amendment of this section has been advocated for many years, but to no avail.

<sup>72</sup> In terms of section 6(2) of AJRA, recourse must first be had to any applicable South African statute as read at J Hare op cit note 57 at 483.

<sup>73</sup> M Stiebel ‘Section 6 of the Admiralty Jurisdiction Regulation Act 105 of 1983 – An analysis, comparison and examination of the case law: part 1’ (2001) 13 *SAMLJ* 226.

<sup>74</sup> H Staniland op cit note 64 at 324.

Admiralty had jurisdiction over indemnity claims. If the answer is in the affirmative, then English law as it existed on 1 November 1983 must be applied by the High Court.<sup>75</sup>

Professor Staniland undertook such an inquiry and concluded that ‘whether or not the admiralty court had jurisdiction to hear a claim based on indemnity is shrouded in obscurity’.<sup>76</sup> Nevertheless, he submits that in the absence of any agreement on the applicable law, English law as of 1 November 1983 has to be applied to indemnity claims.<sup>77</sup> Where the parties have agreed to Roman Dutch Law,<sup>78</sup> the enforceability of an LOI will be determined according to that law. Nevertheless, there are overlapping principles in both English and Roman-Dutch Law that will be considered in order to determine the enforceability of indemnity contracts.

#### 4.4.2 *The requirement of legality*

A contract has to comply with certain requirements<sup>79</sup> in order to be considered valid and enforceable. One of these requirements is that the contract has to be ‘legal in principle’.<sup>80</sup> Accordingly, a contract will be illegal if it is considered to be *inter alia* contrary to good morals or against public policy. An illegal contract (or a part thereof)<sup>81</sup> will accordingly be void and unenforceable.<sup>82</sup> The legality of an indemnity contract must be considered in order to determine whether the actions of the contracting parties is contrary to good morals or is against public policy.

#### 4.4.3 *Contracts that are contra bonos mores*

According to Professor Hare, a carrier that misdelivers cargo, owing to the non-production of the bill of lading, has committed a ‘wilful and major’ breach of the contract of carriage.<sup>83</sup> This breach will, therefore, prevent the carrier from enforcing the indemnity since its actions are *turpis causa*.<sup>84</sup> That is, the carrier’s actions are considered to be immoral. In terms of the *ex turpi causa* rule, neither party can enforce the terms of the contract against the other since no

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<sup>75</sup> H Staniland op cit note 64 at 324.

<sup>76</sup> Ibid at 326.

<sup>77</sup> Ibid. Prof Staniland does not give reasons for his submission. However, the validity of this submission is not germane to this paper and no further study has been done to counter this conclusion.

<sup>78</sup> English law will merely have persuasive force according to Prof Staniland op cit note 64 at 332.

<sup>79</sup> The other requirements are contractual capacity, formalities, possibility and certainty as read at D Hutchison et al *The Law of Contract* 2 ed (2009) 147.

<sup>80</sup> D Hutchison op cit note 78 at 175.

<sup>81</sup> That is, in certain circumstances, ‘where the illegality only affects a part of a contract, that part can be severed from the rest of the contract’ as read at D Hutchison op cit note 78 at 190.

<sup>82</sup> D Hutchison op cit note 78 at 176.

<sup>83</sup> J Hare op cit note 57 at 577.

<sup>84</sup> Ibid.

action can arise from an illegal cause.<sup>85</sup> In other words, if a party suffers damages resulting from the said contract, it will not be able to claim contractual damages from the other party.<sup>86</sup>

The English case of *Merryweather v Nixon*<sup>87</sup> set the precedent for the *ex turpi* doctrine.<sup>88</sup> The court had to determine a suit instituted by a tortfeasor<sup>89</sup> against another alleged joint tortfeasor. The claim was dismissed and the court accordingly held that ‘no contribution could by law be claimed as between joint-wrongdoers.’<sup>90</sup> The general rule established in the *Merryweather v Nixon*<sup>91</sup> case that joint-wrongdoers cannot claim contributions is, however, qualified by two exceptions. First, this rule should be limited to instances where it can be presumed that the claimant was aware that his actions were unlawful.<sup>92</sup> Secondly, the rule is subject to instances where the actions of the claimant are not ‘clearly illegal in itself’.<sup>93</sup>

With regard to the first exception, it is submitted by the authors, Arizon and Semark, that a carrier who delivers cargo against an LOI does so under the general impression that it is not committing a tort.<sup>94</sup> Therefore, where the carrier delivers cargo without the production of the bill of lading to the party lawfully entitled thereto, its actions will not amount to a ‘tort’.<sup>95</sup> However, where contracts are concluded with the intent to commit a tort, it is clear that this deliberate act would render the contract ‘illegal’ regardless of whether there was any criminality or fraud present.<sup>96</sup> Therefore, fraud is not a requirement since it will be sufficient to prove that the parties had the ‘deliberate intent to commit a tort’.<sup>97</sup>

Nevertheless, it is argued that the actions of a carrier who delivers cargo without the production of the bill of lading may amount to fraud where the cargo is delivered to a person other than the true owner of the cargo.<sup>98</sup> This argument is based on the ‘well-known’<sup>99</sup> English

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<sup>85</sup> D Hutchison op cit note 78 at 190.

<sup>86</sup> Ibid.

<sup>87</sup> (1799) 8 TR 186. The *ex turpi causa* doctrine is no longer followed by the English courts since it has largely been overtaken by The Law Reform (Contributory Negligence) Act 1945 and the Civil Liability (Contribution) Act 1978. See F Arizon, D Semark op cit note 1 at 110.

<sup>88</sup> F Arizon, D Semark op cit note 1 at 110.

<sup>89</sup> A ‘tortfeasor’ is a person who commits a tort or civil wrongdoing as read at *LegalMatch*, available at <https://www.legalmatch.com/law-library/article/what-is-a-tortfeasor.html>, accessed on 12 October 2019.

<sup>90</sup> F Arizon, D Semark op cit note 1 at 111.

<sup>91</sup> (1799) 8 TR 186. It is this case which created the perception amongst carriers that letters of indemnity will in majority of cases not be enforceable as suggested in F Arizon, D Semark op cit note 1 at 2.

<sup>92</sup> *Adamson v Jarvis* 130 ER 693 (1827) 4 Bing as cited by F Arizon, D Semark op cit note 1 at 111.

<sup>93</sup> *Moxham v Grant* [1900] 1 QB 93 as cited by F Arizon, D Semark op cit note 1 at 112.

<sup>94</sup> F Arizon, D Semark op cit note 1 at 114.

<sup>95</sup> *Miskin Manor Shipping Co. Ltd v Hebert W Clarke & Sons* (1927-28) 29 Lloyd’s Rep. 282 as cited by F Arizon, D Semark op cit note 1 at 112.

<sup>96</sup> F Arizon, D Semark op cit note 1 at 114.

<sup>97</sup> Ibid.

<sup>98</sup> P Todd *Modern Bills of Lading* 2 ed (1990) 249.

<sup>99</sup> P Todd op cit note 40 at 342.

case, *Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd.*<sup>100</sup> in which<sup>101</sup> the shipper gave the carrier a LOI to issue a clean bill of lading. The carrier proceeded to issue a clean bill of lading all the while knowing that the barrels of orange juice were old and leaking. Consequently, the shipowner was held liable and had to compensate the cargo insurers for their damages accordingly. Subsequently, the shipowner brought an action against the shipper in terms of the indemnity contract. The shipper defended the action. The majority<sup>102</sup> of the court found that the indemnity was unenforceable since the transaction was unlawful.<sup>103</sup> The *ratio decidendi* was that the carrier's actions amounted to a 'tort of deceit'<sup>104</sup> since it clearly lied about the condition of the goods. Consequently, the shipowner's actions were *ex turpi causa* and the contract was unenforceable because it had as its object the commission of the tort of deceit.

It is submitted by Du Toit that the principles<sup>105</sup> of the *Brown Jenkinson* case will not extend to LOIs issued for the delivery of cargo.<sup>106</sup> He argues that the parties in that case, acted with the knowledge and intent to commit a misrepresentation.<sup>107</sup> However, an indemnity contract will be valid and enforceable where a carrier acts in good faith<sup>108</sup> and in accordance with a 'common<sup>109</sup> and convenient practice to avoid delays'.<sup>110</sup>

#### 4.4.4 Public policy<sup>111</sup>

Furthermore, it has to be considered whether the carrier's actions are against public policy. Whilst it is accepted that a LOI will be unenforceable where the carrier had the knowledge or reasonable suspicion that it was delivering goods to a person who was not in fact entitled to such delivery, it is argued to the contrary that to delay a ship would, for financial reasons, not

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<sup>100</sup> [1957] 2 All ER 844.

<sup>101</sup> [1957] 2 All ER 844 at 844.

<sup>102</sup> Evershed LJ gave a dissenting judgment since he was not satisfied that the court was justified in holding that the plaintiff's case arose *ex turpi causa* [1957] 2 All ER 844 at 858.

<sup>103</sup> *Brown Jenkinson* supra note 9 at 844.

<sup>104</sup> Ibid.

<sup>105</sup> According to Morris J, an illegal consideration contains the following elements: (a) the making of a representation of fact; (b) which was false, (c) which was known to be false, (d) with intent that it should be acted on, as held in *Brown Jenkinson* supra note 99 at 855.

<sup>106</sup> SF Du Toit op cit note 15 at 189.

<sup>107</sup> Ibid.

<sup>108</sup> That is acting without any reason to suspect that the party receiving delivery is not entitled thereto.

<sup>109</sup> It was, however, indicated in the *Brown Jenkinson* supra note 99 case that 'the mere fact that a practice is common does not mean that the courts will uphold it' as read at P Todd op cit note 97 at 249.

<sup>110</sup> SF Du Toit op cit note 15 at 189.

<sup>111</sup> 'Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy not be enforced' as read at *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 8.

be in the best interest of the public since the extra carriage costs would raise the follow-on cost of merchandise.<sup>112</sup>

Considering the practical difficulties created by the presentation rule and the frequent late arrival of bills of lading at the port of discharge, it would, as a matter of policy, be unreasonable to bar a carrier's claim against its indemnifier.<sup>113</sup> This is because the party indemnifying the carrier (normally a shipper or consignee) has just as much, if not more, interest in the cargo being discharged timeously as a carrier.<sup>114</sup> Therefore, it is argued that it would be 'unfair' to deny the carrier the right to enforce the LOI that was given to it, in order to avoid a delay which essentially benefits the indemnifier more than the carrier.<sup>115</sup>

Furthermore, the act of delivering cargo without the presentation of the bill of lading in itself is not considered to be 'manifestly illegal',<sup>116</sup> since the intent behind the carrier's actions is merely to remedy the problem caused by the late arrival of the bill of lading. Therefore, it is submitted by two legal authors<sup>117</sup> that the enforcement of LOIs issued to assist the delivery of cargo does not contravene public policy.

Principles of illegality and public policy<sup>118</sup> are not applicable where either the carriage contract or charterparty contains a clause that expressly requests rather than requires the shipowner to deliver the cargo, and the shipowner is entitled to refuse to act upon such request.<sup>119</sup> In these circumstances, the LOI will be valid and enforceable. Nevertheless, there remain a number of issues that might arise from the use of standard P&I Club LOIs that shipowners and carriers should note. Some of these issues will be discussed in the section to follow.

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<sup>112</sup> SF Du Toit op cit note 15 at 192.

<sup>113</sup> F Arizon, D Semark op cit note 1 at 114.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> *A/S Hansen-Tangens Rederi III v Total Transport Corporation (The 'Sagona')* [1984] 1 Lloyd's Rep. 194 at 205.

<sup>117</sup> SF Du Toit op cit note 15 at 192.

<sup>118</sup> Support for this submission is derived from the judgment in the *Laemthong International Lines Company Ltd v Artis and Others (The 'Laemthong Glory') (No. 2)* [2005] 1 Lloyd's Rep. 688, where the court notably reached its decision without inquiring whether this type of LOI was, in fact, enforceable in terms of public policy.

<sup>119</sup> F Arizon, D Semark op cit note 1 at 114.

#### 4.4.5 The consequences of non-compliance with the terms of a standard P&I Club LOI

Notwithstanding the International Group of P&I Clubs' objections<sup>120</sup> to its members using LOIs, it has created a series of standard forms<sup>121</sup> in an attempt to mitigate its members' risks.<sup>122</sup> A number of issues have however arisen from the use of standard LOIs, especially where a shipowner seeking to enforce such an LOI has not strictly complied with the wording thereof (more specifically where there has been non-compliance with clauses 1<sup>123</sup> and 3<sup>124</sup> of the 'Group A' LOI).

The English case, *The Laemthong Glory (No.2)*<sup>125</sup> highlighted the issue of whether a third party such as the shipowner could enforce an LOI which was issued to a charterer by a receiver. In that case, two LOIs were issued – one by the charterer to the shipowner and a second one by the receiver to the charterer.<sup>126</sup> The shipowner sought not only to enforce the LOI from the charterer but also to enforce the receiver's LOI relying on clauses 1 and 3 of the standard LOI. The English Commercial Court found that the shipowner could, in terms of clauses 1 and 3, enforce the receiver's LOI.<sup>127</sup> The Commercial Court's judgment was upheld by the English Court of Appeal.<sup>128</sup> Therefore, the standard LOI's wording allows for it to be enforced by third parties such as the shipowner.<sup>129</sup>

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<sup>120</sup> B Kirrane 'The Risks of Letters of Indemnity' *Steamship Mutual* January 2017, available at <https://www.steamshipmutual.com/publications/Articles/riskiflettersindemnity.htm>, accessed on 17 October 2019.

<sup>121</sup> There are different 'groups' of standard letters of indemnity and each group provides for a different situation. For example 'Group A' makes provision for a LOI to be given in return for delivering cargo without production of the original bill of lading: See UKP&I 'International Group Standard Letters of Indemnity', available at, <https://www.ukpandi.com/knowledge-publications/industry-issues/international-group-of-pi-clubs/international-group-standard-letters-of-indemnity/>, accessed on 17 October 2019.

<sup>122</sup> *Hellenic Shipping* 'Letters of Indemnity (LOIs) and recent English Court decisions' 11 February 2019, available at <https://www.hellenicshippingnews.com/letters-of-indemnity-lois-and-recent-english-court-decisions/>, accessed on 17 October 2019.

<sup>123</sup> Clause 1 provided 'to indemnify you, your servants and agents and hold all of you harmless in respect of any liability, loss, damage or expense of whatsoever nature which you may sustain by reason of delivering the cargo in accordance with our request' as stated in *The Laemthong Glory (No. 2)* supra note 117 at 632.

<sup>124</sup> Clause 3 provided: 'If in connection with delivery of the cargo as aforesaid the ship or any other ship...in the same or associated ownership...should be arrested or detained...to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of the ship...and to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention...' as in *The Laemthong Glory (No. 2)* supra note 117 at 632.

<sup>125</sup> *The Laemthong Glory (No. 2)* supra note 117 at 632.

<sup>126</sup> The charterer forwarded both these LOIs to the shipowner.

<sup>127</sup> *The Laemthong Glory (No. 2)* supra note 117 at 638.

<sup>128</sup> Ibid at 698.

<sup>129</sup> The court reasoned that 'the whole purpose of the receivers LOI was on the one hand to ensure that the receivers received the cargo from the ship without production of the original bills of lading and on the other hand to ensure that the owners were fully protected from the consequences of arrest or other action which might be taken by the holders of the original bills of lading: *The Laemthong Glory (No. 2)* supra note 117 at 696 – 697.

Another issue is that an undertaking provided by a charterer in the LOI is conditional upon the shipowner delivering the cargo to the named party in the LOI. That is, in order for the LOI to avail, the shipowner has to deliver (and not merely discharge) the cargo to the named party in the LOI.

The court in *The Bremen Max*<sup>130</sup> drew a distinction between the concepts of ‘discharge’ and ‘delivery’. The former concept was the ‘movement of the cargo from the ship over the ship’s rail ashore’,<sup>131</sup> whereas the latter concept referred to ‘the transfer of possession<sup>132</sup> of the cargo to a person ashore’.<sup>133</sup> Therefore, the obligation placed on the shipowner in terms of clause 1<sup>134</sup> of the LOI is clearly that of delivery, and it is only once delivery has been effected that the LOI will come into operation.<sup>135</sup>

It was noted by Teare J, that the shipowner is not obliged to inquire into whether the named party is entitled to possession of the cargo. It is sufficient for the shipowner to know that the party it is delivering to is the nominated party. However, if there is any doubt on the part of the shipowner, is entitled to request the charterer to identify the intended receiver.<sup>136</sup>

Furthermore, where a shipowner discharges the cargo to an agent representing the named party in the LOI, and the agent delivers the cargo to the named party, it is held that the LOI will be activated and the shipowner will be entitled to an indemnity from the party who issued the LOI.<sup>137</sup>

In *The Zagora*,<sup>138</sup> the shipowner was provided with an LOI which required it to discharge and release the cargo to the named party or ‘to such party as [the shipowner] believes to be or to represent [the named party]’.<sup>139</sup> Subsequently, the master discharged the cargo to an alleged agent of the named party. The charterers who issued the LOI alleged that the discharge of the cargo did not engage the LOI since it did not amount to delivery to the named party. It was

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<sup>130</sup> *The Bremen Max* supra note 58.

<sup>131</sup> *Ibid* at 87.

<sup>132</sup> The shipowner transfers possession when he has divested himself of ‘the power to compel any dealing in or with the cargo which can prevent the consignee from obtaining possession’ as held in *Great Eastern Shipping Co Ltd v Far East Chartering Ltd and Another (The ‘Jag Ravi’)* [2012] 1 Lloyd’s Rep. 637.

<sup>133</sup> The court does, however, accept that in some instances the act of discharge and delivery might occur simultaneously as in the case of *The Bremen Max* supra at 87.

<sup>134</sup> Clause 1 provided as follows ‘to indemnify you, your servants and agents and hold all of you harmless in respect of any liability, loss, damage or expense of whatsoever nature which you may sustain by reason of delivering the cargo in accordance with our request’.

<sup>135</sup> *The Bremen Max* supra at 87.

<sup>136</sup> *Ibid*.

<sup>137</sup> *Oldendorff GmbH & Co KG v Sea Powerful II Special Maritime Enterprises (The ‘Zagora’)* [2017] 1 Lloyd’s Rep. 194 at 200. In this case three actions were consolidated in to one trial.

<sup>138</sup> *Ibid*.

<sup>139</sup> *Ibid* at 194.



further alleged that the agent to whom the cargo was discharged was not acting on behalf of the named party. The court found that even if the agent was not acting on behalf of the named party, which was not the case in this instance, it would be sufficient for the shipowners to believe that the agent was acting on behalf of the named party in order for the LOI to be engaged.<sup>140</sup> However, this belief was subject to the court finding it to be ‘honest’ and not ‘arbitrary, capricious or irrational’.<sup>141</sup>

The most recent case dealing with the enforceability of standard LOIs is *The Songa Winds*.<sup>142</sup> The issue highlighted in that case was whether a beneficiary of a LOI claim is subject to a time bar contained in the charterparty where the LOI makes no reference to the terms of the charterparty. The voyage charterparty contained a clause which provided that ‘the period of validity of any [LOI] will be 3 months from date of issue’.<sup>143</sup> The voyage charterer argued that this clause extended to the LOI issued by it to the disponent owner,<sup>144</sup> and so the disponent owner’s claim was barred in terms of clause 38 of the voyage charterparty. The English Commercial Court, however, held that the disponent owner’s claim was not defeated by the operation of the time-bar clause in the voyage charterparty.<sup>145</sup> The voyage charterer’s appeal to the Court of Appeal was dismissed.<sup>146</sup>

The decision of the Court of Appeal means that the beneficiary of an LOI will only be bound by the terms of the indemnity contract, and the terms of the underlying contract will not be extended thereto.<sup>147</sup> This is due to the indemnity contract and the underlying contract being ‘quite distinct agreements with separate and distinct rights and obligations’.<sup>148</sup>

The use of standard LOIs come with their own problems. Whilst these forms are recommended by P&I Clubs to their members, it nevertheless remains the member’s responsibility to comply with the terms in order for the LOIs to be engaged. Furthermore, it is important for the receiver of the LOI to ensure that the indemnifier has the capacity to comply

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<sup>140</sup> The court came to this conclusion based on the facts of the case in *The Zagora* supra note 136 at 201.

<sup>141</sup> *The Zagora* supra note 136 at 201.

<sup>142</sup> *Navig8 Chemicals Pool Inc v Glencore Agriculture BV (The ‘Songa Winds’)* [2018] EWCA Civ 1901.

<sup>143</sup> *Ibid* at 1085.

<sup>144</sup> A disponent owner is a demise charterer. A demise charterer ‘displaces the [ship] owner’ for the period that it leases the vessel and takes possession and full control thereof. This type of charterparty differs significantly from others such as voyage or time charterers as described in JF Wilson op cit note 17 at 7.

<sup>145</sup> *The Songa Winds* supra note 141 at 1085.

<sup>146</sup> *Ibid* at 1086.

<sup>147</sup> According to English law, when interpreting a commercial agreement, the said agreement was to be regarded as containing all the terms of the bargain between the parties: *The Songa Winds* supra note 141 at 1085.

<sup>148</sup> *The Songa Winds* supra note 141 at 1086.

with the recommended provisions.<sup>149</sup>

#### 4.5 Conclusion

It is evident from the above discussion that there are countervailing views and opinions in respect of the enforceability of LOIs and their use to circumvent the presentation rule. An appropriate analogy describing the benefit and risk associated with the use of LOIs is as follows:

‘[LOIs] are similar to the oil required by an old engine to overcome the problems associated with elderly valves and cylinders which fail to perform from time to time. Sometimes the use of this oil may cause parties to slip and suffer a serious injury, but this does not mean that their use should be banned, for the same can occur with other contracts such as letters of credit or performance bonds.’<sup>150</sup>

It is accepted that from an economic perspective<sup>151</sup> a LOI in the shipping context serves as a document of ‘legal and commercial convenience’.<sup>152</sup> However, if the LOI is not handled with care, it will jeopardise the function of the bill of lading as a transferable document of title.<sup>153</sup> Therefore, it remains of vital importance that the integrity of the bill of lading as a transferable document of title is safeguarded in order to maintain its validity amongst traders.<sup>154</sup>

Notwithstanding the important function of the LOI, it is considered to be a temporary solution which does not meet the requirements of the modern commercial world.<sup>155</sup> Therefore, it is proposed that the electronic bill of lading provides a more permanent and modern solution to the problems created by the presentation rule and the subsequent problems of the LOI. This proposition will briefly be considered in the next chapter.

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<sup>149</sup> B Kirrane ‘The Risks of Letters of Indemnity’ *Steamship Mutual* January 2017, available at <https://www.steamshipmutual.com/publications/Articles/riskiflettersindemnity.htm>, accessed on 17 October 2019.

<sup>150</sup> F Arizon, D Semark op cit note 1 at 4.

<sup>151</sup> Č Pejović op cit note 19 at 18. In the absence of accurate figures it is alleged that the use of LOIs have in most instances resulted in the parties saving costs which they would have otherwise been liable for due to the ship being delayed. See F Arizon, D Semark op cit note 1 at 124.

<sup>152</sup> A Mitchelhill op cit note 53 at 61.

<sup>153</sup> C Proctor op cit note 16 at 132.

<sup>154</sup> W Tetley op cit note 10 at 676.

<sup>155</sup> RM Wiseman ‘Transaction Chains in North Sea Oil Cargoes’ (1984) 2 J. Energy & Nat. Resources L. 143.

## CHAPTER 5

### THE ELECTRONIC BILL OF LADING<sup>1</sup>

#### 5.1 Introduction

The letter of indemnity as discussed in chapter 4 is fundamentally incapable of replacing the bill of lading since it cannot substitute for the function of the bill of lading as a document of title.<sup>2</sup> At most the letter of indemnity is colloquially termed entering through the back door of the warehouse. The bill of lading, also known as the ‘key to the warehouse’, has existed in paper format for centuries.<sup>3</sup> It is issued on a standard A4 paper size and contains the necessary details of all the parties involved in the contract of carriage.<sup>4</sup> The tangibility of the bill of lading provides traders with the security of possession and transferability.<sup>5</sup> However, the transferability of the bill of lading poses many difficulties; one such practical difficulty being the late arrival of the bills of lading at the port of discharge.<sup>6</sup>

The practical difficulties created by the transferability of the bill of lading, together with the advent of the fourth industrial revolution, have necessitated the replacement of the paper bill with an electronic alternative. It is suggested that the electronic bill of lading may be the modern solution to this archaic problem.<sup>7</sup> The ability of the electronic bill of lading to replace the paper bill of lading depends mainly on its ability to replicate the three functions inherent to bills of lading.<sup>8</sup> Whilst the ability of the electronic bill of lading to function as a receipt and

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<sup>1</sup> This chapter is not intended to be an exposition on the technicality and legality of electronic bills of lading. The scope of this chapter is limited to the electronic bill of lading’s ability to function as a document of title and how this will affect the presentation rule.

<sup>2</sup> F Arizon, D Semark *Maritime Letters of Indemnity* (2014) 124.

<sup>3</sup> WH van Boom ‘Certain legal aspects of electronic bills of lading’ (1997) 32(1) *European transport law: Journal for law and economics* 9.

<sup>4</sup> For example it will contain the details of the shipper and consignee, the quantity and quality of the goods, conditions of carriage and provides for the signature of the Master of the ship.

<sup>5</sup> J Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed (1999) 602.

<sup>6</sup> The legal implications of the late arrival of the bill of lading have been discussed in chapters 3 and 4. There are also very high costs attached to the use of paper-based transport documents as read at J Hare op cit note 5 at 723.

<sup>7</sup> I Carr, P Stone *International Trade Law* 6 ed (1995) 195.

<sup>8</sup> The bill of lading functions as a receipt, evidence of the contract of carriage and it is a document of title; this has been explained in chapter 1. The replication of these three functions is referred to as a ‘functional equivalence’. In order for the electronic bill of lading to reach this ‘functional equivalence’ it is said that it does not necessarily have to ‘mirror precisely the operation of an original paper bill of lading’, but the holder of an electronic bill of lading must be in the same position as the holder of the original paper bill of lading’ as read at S Tricks, R Parson ‘The legal status of the electronic bill of lading – A report for the ICC Banking Commission’ *Clyde & Co* 2018 available at, [https://www.clydeco.com/uploads/Files/The\\_Legal\\_Status\\_of\\_E-bills\\_of\\_Lading\\_-\\_ICC\\_and\\_Clyde\\_Co.pdf](https://www.clydeco.com/uploads/Files/The_Legal_Status_of_E-bills_of_Lading_-_ICC_and_Clyde_Co.pdf), accessed on 2 June 2019.

evidence of the carriage contract is not in dispute,<sup>9</sup> it is questionable whether it could function as a transferable document of title.<sup>10</sup>

This chapter will commence with a brief discussion on the challenges posed by the intrinsic nature of the electronic bill of lading. Secondly, the ability of an electronic alternative to function as a transferable document of title will briefly be discussed. Thirdly, the effect of these electronic alternatives on the presentation rule will be considered. Lastly, the possible shortcomings of these electronic alternatives will be discussed.

## 5.2 *The nature of an electronic bill of lading*

The electronic bill of lading is an electronic record<sup>11</sup> which is described as follows:

‘[It] is a series of electronic messages, in a form similar to emails, containing information or instructions relevant to the goods concerned and their carriage and delivery, of the same type as in a paper bill. The communications are generally in EDI (electronic data interchange) form where a format for the messages is agreed in advance.’<sup>12</sup>

The electronic bill of lading is created and transmitted electronically.<sup>13</sup> It never takes the form of a paper document, and therein lies the problem. There is no hard copy of the electronic bill of lading that can be issued, signed, physically passed on to a consignee or endorsed and presented to the carrier at the port of discharge in exchange for receipt of the goods.<sup>14</sup> Consequently, it is suggested that the transferable electronic bill of lading concept should be abandoned and the focus should be placed on developing electronic systems and the laws regulating them.<sup>15</sup>

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<sup>9</sup> F Arizon, D Semark op cit note 2 at 78; JF Wilson *Carriage of Goods by Sea* 7 ed (1988) 166.

<sup>10</sup> One of the ‘key’ challenges is replicating the document of title function in the electronic bill of lading as stated in UNCTAD ‘The Use of Transport Documents in International Trade’ 26 November 2003 at 12, available at [https://unctad.org/en/Docs/sdtetlb20033\\_en.pdf](https://unctad.org/en/Docs/sdtetlb20033_en.pdf), accessed on 10 April 2019.

<sup>11</sup> S Tricks, R Parson ‘The legal status of the electronic bill of lading – A report for the ICC Banking Commission’ *Clyde & Co* 2018 supra note 8, accessed on 2 June 2019.

<sup>12</sup> R Aikens, R Lord & M Bools *Bills of Lading* 2 ed (2015) 145.

<sup>13</sup> S Tricks, R Parson ‘The legal status of the electronic bill of lading – A report for the ICC Banking Commission’ *Clyde & Co* 2018 supra note 8, accessed on 2 June 2019.

<sup>14</sup> J Hare op cit note 5 at 602; R Aikens, R Lord & M Bools op cit note 12 at 45.

<sup>15</sup> ‘Any new law dealing with electronic bills of lading should not try to replicate the past in an electronic environment so as to find a functional equivalent, but rather should leave it to the electronic environment to reveal new different ways of accomplishing the goals’ as suggested by F Arizon, D Semark op cit note 2 at 126 – 127.

### 5.3 *Electronic systems as alternatives to paper bills of lading*

Over the past century, there have been a number of attempts to ‘dematerialise’<sup>16</sup> the bill of lading through electronic systems, some of which have been more successful than others.<sup>17</sup> The more successful of these attempts include the development of central registries, private key systems and more recently distributed ledgers. Through these electronic systems, the use of electronic bills of lading is realised.

#### 5.3.1 *Central registry systems*<sup>18</sup>

One of the first attempts occurred during the 1980s<sup>19</sup> when a registry system to administer the electronic bill of lading was developed by Chase Manhattan Bank in conjunction with the Association of Independent Oil Tanker Operators (‘INTERTANKO’).<sup>20</sup> The central registry referred to as ‘SEADOCS’ (‘SeaDocs Registry Limited’) endeavoured to reach a compromise between paper documents and a fully electronic system.<sup>21</sup> This system entailed the lodgement of the paper bill with Chase Manhattan Bank which operated as a central registry.<sup>22</sup> This system still made use of a tangible document which, amongst other reasons, led to its downfall.<sup>23</sup> Whilst this registry system was short-lived,<sup>24</sup> it proved that it is possible for a central registry system to operate on an international scale.<sup>25</sup> It also paved the way for subsequent central registry systems.

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<sup>16</sup> M Dubovec ‘The problems and possibilities for using electronic bills of lading as collateral’ (2006) 23(2) *AJICL* 449.

<sup>17</sup> For example, three electronic bills of lading systems have been approved by the International Group of P&I Clubs. In 2010, the Bolero and essDOCS systems were approved and in 2015 the so called ‘e-title’ system was approved: J Tan, L Star ‘Legal briefing: Electronic bills of lading’ *UK P&I Club* May 2017, available at [https://www.ukpxandi.com/fileadmin/uploads/ukpi/Documents/2017/Legal\\_Briefing\\_e\\_bill\\_of\\_Lading\\_WEB.pdf](https://www.ukpxandi.com/fileadmin/uploads/ukpi/Documents/2017/Legal_Briefing_e_bill_of_Lading_WEB.pdf), accessed on 24 October 2019. Another system which has been developed is called ‘GlobalTrade Secure Payment and Trade Management System’. However, this system is focused on providing a system through which letters of credit and seawaybills can be transferred through the use of the Internet as described in UNCTAD ‘The Use of Transport Documents in International Trade’ 26 November 2003 at 12, available at [https://unctad.org/en/Docs/sdtetlb20033\\_en.pdf](https://unctad.org/en/Docs/sdtetlb20033_en.pdf), accessed on 10 April 2019.

<sup>18</sup> The central registry models resemble an electronic version of the ‘book of lading’ which was the first form of bills of lading as described by C Albrecht ‘Blockchain bills of lading: The end of history: Overcoming paper-based transport documents in Sea Carriage through new technologies’ (2019) 43 *Tul. Mar. L.J.* 269.

<sup>19</sup> I Carr, P Stone op cit note 7 at 179.

<sup>20</sup> C Proctor *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document in Financing International Sale Contracts* (unpublished LLM dissertation, the University of South Africa, 1996) 135.

<sup>21</sup> M Dubovec op cit note 16 at 449.

<sup>22</sup> I Carr, P Stone op cit note 7 at 198.

<sup>23</sup> Other reasons for the SeaDocs system not succeeding were confidentiality concerns; and it was not financially viable since the insurance costs were too high as stated in I Carr, P Stone op cit note 7 at 198.

<sup>24</sup> The project did not survive its trial period and barely lasted a year: as stated by M Dubovec op cit note 16 at 449; C Proctor op cit note 20 at 135.

<sup>25</sup> C Proctor op cit note 20 at 135.

The Bill of Lading Electronic Registry Organisation ('Bolero') project is another central registry system. This project emerged in 1989<sup>26</sup> and although it initially appeared to be unsuccessful,<sup>27</sup> it has gained some momentum over the last few years. The Bolero system works as a registry by storing data relating to the title in the goods.<sup>28</sup> In other words, the registry maintains a record of each electronic bill issued, including the identity of any individual who previously had title to it.<sup>29</sup> The bill of lading is prepared and issued entirely electronically,<sup>30</sup> and it is said that it 'replicates the core elements of a traditional paper bill of lading, namely its functions as a receipt, evidence of the contract of carriage and as a document of title.'<sup>31</sup> The Bolero bill is created and deposited in the registry by the carrier.<sup>32</sup> The registry then forwards the Bolero bill to the seller.<sup>33</sup> Once it is time for the cargo to be delivered, instead of producing the paper bill of lading, the carrier will verify the identity of the *bona fide* holder of the bill through the title registry.<sup>34</sup> The registry is readily available and accessible by the carrier or any other person authorised to access it.<sup>35</sup>

### 5.3.2 Private key systems

The concept of 'private keys', developed through the Comité Maritime International ('CMI') Rules<sup>36</sup> for electronic bills of lading ('CMI Rules'), originated in 1990<sup>37</sup> and, unlike the Bolero project, it does not make use of a central registry system available only to members.<sup>38</sup> The goal of the CMI Rules is to provide a viable electronic alternative<sup>39</sup> to the bill of lading and to create a 'contractual framework' to regulate the use thereof.<sup>40</sup> It sought to achieve its goal through the

<sup>26</sup> N Chetrit et al 'Not just for illicit trade in contraband anymore: using blockchain to solve a millennial-long problem with bills of lading' (2018) 20(2) *Va. J.L. & Tech.* 77.

<sup>27</sup> This was due to the lack of support from the banking industry as argued by M Dubovec op cit note 16 at 449.

<sup>28</sup> F Arizon, D Semark op cit note 2 at 127.

<sup>29</sup> Ibid.

<sup>30</sup> WH van Boom op cit note 3 at 11.

<sup>31</sup> Bolero 'Electronic Bills of Lading (eBL)', available at <http://www.bolero.net/home/electronic-bills-lading/>, accessed on 21 October 2019.

<sup>32</sup> WH van Boom op cit note 3 at 11.

<sup>33</sup> Ibid. This then enables the seller to obtain payment under the sales contract.

<sup>34</sup> F Arizon, D Semark op cit note 2 at 128.

<sup>35</sup> WH van Boom op cit note 3 at 11.

<sup>36</sup> The CMI Rules can be accessed at <http://www.comitemaritime.org>.

<sup>37</sup> M Dubovec op cit note 16 at 453.

<sup>38</sup> UNCTAD 'The Use of Transport Documents in International Trade' 26 November 2003 at 12, available at [https://unctad.org/en/Docs/sdtetlb20033\\_en.pdf](https://unctad.org/en/Docs/sdtetlb20033_en.pdf), accessed on 10 April 2019.

<sup>39</sup> The CMI Rules aspired to create an electronic bill of lading which was capable of being 'endorsed/negotiated through the use of a secret code or 'private key', unique to its holder' as stated in 'The Use of Transport Documents in International Trade' supra, accessed on 10 April 2019.

<sup>40</sup> UNCTAD 'The Use of Transport Documents in International Trade' 26 November 2003 at 12, available at [https://unctad.org/en/Docs/sdtetlb20033\\_en.pdf](https://unctad.org/en/Docs/sdtetlb20033_en.pdf), accessed on 10 April 2019.

implementation of a private key system which <sup>41</sup> is defined in article 2 of the CMI Rules as ‘[A]ny technically appropriate form, such as a combination of numbers and/or letters, which the parties may agree for securing the authenticity and integrity of a transmission.’

The rights of the holder<sup>42</sup> of the private key against the carrier are set out in article 7 of the CMI Rules. The current holder has the right to *inter alia* claim delivery of the goods from the carrier at the port of discharge.<sup>43</sup> The carrier issues the private key and is the only party authorised to do so. The key cannot be transferred from one party to another without the involvement of the carrier. When the parties negotiate the key, the carrier re-issues a new key to the subsequent holder. Thus, each party who subsequently becomes a holder receives a key that is unique to the holder.<sup>44</sup> With the private key system, the carrier is notified of any dealings that occur on the bill of lading and remains cognisant of the identity of the holder thereof.<sup>45</sup> Due to the carrier remaining actively involved in the transferring process it will always know the identity of the party who is entitled to delivery.<sup>46</sup> Therefore, the carrier essentially acts as a gate-keeper.

### 5.3.3 Distributed ledgers

The blockchain technology was originally designed to operate cryptocurrencies such as ‘Bitcoin’.<sup>47</sup> The blockchain system differs from that of the private key and central registry systems in that it requires neither the intervention of the carrier or other third party to monitor the transferring of the bill. The blockchain system replaces third party monitoring with ‘peer-to-peer verification’.<sup>48</sup> The transactions between parties are recorded in an ‘online distributed ledger’.<sup>49</sup> The recorded data cannot be varied or changed.<sup>50</sup> Hence, it makes the data both

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<sup>41</sup> ‘The same [private] key is used for both encrypting and decrypting the information contained in the electronic text’: JF Wilson op cit note 9 at 168.

<sup>42</sup> The current holder of the key is the party ‘who would be the person otherwise entitled to possession of the bill of lading under the normal documentary procedure’: JF Wilson op cit note 9 at 8.

<sup>43</sup> The current holder’s other rights in terms of art 7 of the CMI Rules include nominating the consignee or substituting a nominated consignee for any other party (including itself); transferring the right of control and transferring to another party; providing the carrier with ‘any other instructions concerning the goods in accordance with the terms and conditions of the contract of carriage, as if it were the holder of a paper bill of lading’.

<sup>44</sup> M Dubovec op cit note 16 at 451.

<sup>45</sup> F Arizon, D Semark op cit note 2 at 128.

<sup>46</sup> Ibid.

<sup>47</sup> I Carr, P Stone op cit note 7 at 200.

<sup>48</sup> N Chetrit et al op cit note 26 at 81.

<sup>49</sup> This is also referred to as a ‘permissioned blockchain’. There is also an ‘un-permissioned blockchain’. The former is a closed network, whereas the latter is an open network. The permissioned blockchain, is however, more suited for the purposes of dematerialising the paper bill of lading as suggested by DA Bury ‘Electronic bills of lading: a never-ending story’ (2016) 41 *Tul. Mar. L.J.* 235.

<sup>50</sup> I Carr, P Stone op cit note 7 at 200.

verifiable and permanent, allowing for new data only to be appended.<sup>51</sup> In essence, every time a data transfer takes place through the distributed ledger a new block is created which contains the information of the said transfer. The new block of information is then ‘appended’ to the previous block of information, thus forming an unbreakable ‘chain of blocks’.<sup>52</sup> The new block of information will only be added once the new transaction is validated and it is confirmed that it does not invalidate any of the previous blocks.<sup>53</sup>

The shipping industry is able to utilise blockchain technology.<sup>54</sup> Once the carrier receives the goods from the shipper, it will record in the distributed ledger containing the required information in respect of the goods,<sup>55</sup> as well as the particulars of the consignor and consignee.<sup>56</sup> Once the shipper has paid the carrier in terms of the contract of carriage, the shipper will be issued tokens.<sup>57</sup> The shipper is accordingly entitled to transfer the tokens through the distributed ledger to subsequent buyers of the cargo. Through the transfer of the tokens, the shipper relinquishes possession thereof to the buyer or bank, thereby unable to access these again. The token is only accessible by its subsequent holder.<sup>58</sup> Similar to the private key and central registry systems, the carrier will effect delivery to the current holder of the token. The carrier will verify the current holder on the distributed ledger (which contains the transfer history of the tokens).<sup>59</sup> It is said that blockchain technology may be the shipping industry’s best chance at creating a transferable electronic bill of lading.<sup>60</sup>

#### 5.4 *Status as a document of title*

The document of title function is believed to be the most difficult of the functions to replicate electronically.<sup>61</sup> This is for many reasons, one of which is that the available technology is not capable of developing an electronic instrument which is unique in itself.<sup>62</sup> In order for a

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<sup>51</sup> K Takahashi ‘Blockchain technology and electronic bills of lading’ (2016) 22 *JIML* 202.

<sup>52</sup> J Herd ‘Blocks of lading: distributed ledger technology and the disruption of sea carriage regulation’ (2018) 18(2) *QUT L. Rev.* 309.

<sup>53</sup> N Chetrit et al op cit note 26 at 80.

<sup>54</sup> J Herd op cit note 52 at 309.

<sup>55</sup> This information is the same as that which would normally be included on a paper bill of lading, for example the quantity and quality of the goods. The carrier will also note whether the bill is claused or not: J Herd op cit note 52 at 309.

<sup>56</sup> Ibid.

<sup>57</sup> The address at which the tokens are kept is recorded in the blockchain ledger as read at K Takahashi op cit note 51 at 209.

<sup>58</sup> J Herd op cit note 52 at 309.

<sup>59</sup> Ibid.

<sup>60</sup> DA Bury op cit note 49 at 234.

<sup>61</sup> M Dubovec op cit note 16 at 442.

<sup>62</sup> F Arizon, D Semark op cit note 2 at 126.



document to qualify as a ‘document of title’ to goods it has to be unique, and the document must represent the goods.<sup>63</sup> The problem lies not with the copying of the electronic document itself since that is capable of being replicated identically. However, in order to prevent fraudulent activity, a document of title such as the paper bill of lading has to be unique. In other words, since the paper bill of lading is considered to be the ‘key to the warehouse’,<sup>64</sup> there can only be one of them. Otherwise, the document loses its significance, since anyone can access the warehouse through fraudulent means. The other difficulty lies in the fact that a document of title can only develop through statutory or customary recognition.<sup>65</sup>

#### 5.4.1 Customary recognition

A bill of lading functions as a document of title as a result of the usage of merchants.<sup>66</sup> The practices and usages of merchants are ever-evolving and so are the documents that they trade with.<sup>67</sup> It is therefore, argued that recognition through mercantile customs<sup>68</sup> is the key to the electronic bill of lading being recognised as a document of title by the courts.<sup>69</sup> It is said that the recognition of a practice as customary only comes to pass when it is ‘a general usage’ that is ‘judicially ascertained and established’, is an indication that the law is progressing slower than commercial practices.<sup>70</sup> However, there is English case law<sup>71</sup> that suggests that a recently developed trade usage can be recognised to establish the ‘negotiability of a document’. Nevertheless, it remains a requirement to prove universal usage amongst traders.<sup>72</sup> A general usage for electronic bills of lading can be established in two possible ways: first by the world’s leading nations adopting the electronic bill of lading as one of their principal sea transport documents that will allow for a general usage to be established;<sup>73</sup> secondly, it is contended that

<sup>63</sup> J Herd op cit note 52 at 313.

<sup>64</sup> F Arizon, D Semark op cit note 2 at 126.

<sup>65</sup> This was discussed in chapter 2. See sub sub-paragraph 2.2.3.

<sup>66</sup> *Lickbarrow v Mason* (1787) 2 TR 63, 100 ER 35.

<sup>67</sup> M Dubovec op cit note 16 at 438.

<sup>68</sup> The electronic bill of lading has to be recognised and accepted by the ‘world’s leading nations’ according to WH van Boom op cit note 3 at 18.

<sup>69</sup> C Albrecht op cit note 18 at 268.

<sup>70</sup> Ibid.

<sup>71</sup> The case of *Goodwin v Robarts*, (1875) 10 LR Exch. 337 is cited in support of this notion by the authors of ‘Blockchain bills of lading: The end of history: op cit. 268.

<sup>72</sup> C Albrecht op cit note 18 at 268.

<sup>73</sup> This is the ‘less favourable’ option since it largely depends on the support of legal systems around the world and this might take a long time: time to happen as read at C Albrecht op cit note 18 at 268. Notwithstanding Despite the slow progress in electronic bills of lading gaining legal recognition, over the last few years, there has been an increase in traders who have started using electronic bills of lading through electronic systems. The UK P&I Club noted that many of their members are starting to utilise electronic bills of lading: as read at J Tan, L Star ‘Legal briefing: Electronic bills of lading’ *UK P&I Club* May 2017, available at [https://www.ukpandi.com/fileadmin/uploads/ukpi/Documents/2017/Legal\\_Briefing\\_e\\_bill\\_of\\_Lading\\_WEB.pdf](https://www.ukpandi.com/fileadmin/uploads/ukpi/Documents/2017/Legal_Briefing_e_bill_of_Lading_WEB.pdf), accessed on 24 October 2019.

‘the trade usage established for the traditional bill of lading applies *mutatis mutandis*’ to electronic bills of lading that are functionally equivalent.<sup>74</sup> This would entail a wider approach by the courts in establishing a new usage through applying an established one in a modern way.<sup>75</sup>

It is further argued that the courts would not concern themselves with minor technical requirements, such as the bill being printed on paper when its functions can successfully be replicated through electronic means.<sup>76</sup> This is especially the case, considering more broadly that documents have evolved from stone to paper.<sup>77</sup> Therefore, the electronic bill of lading is merely a further development of documents. Thus, once an electronic system is developed that is capable of replicating all three functions of the paper bill of lading, the courts would be hard-pressed not to accept electronic bills of lading as documents of title.

It is said that one such system that is capable of possessing all the features essential to a bill of lading, and arguably the only one, is the blockchain system.<sup>78</sup> Since, unlike the Bolero project<sup>79</sup> and the private key system provided for by the CMI Rules, the blockchain electronic bill of lading is unique, capable of possession and it can be transferred to another party.<sup>80</sup> Nevertheless, the use of the blockchain, central registry or private key electronic bills of lading are not yet formally recognised or accepted as a customary practice amongst traders,<sup>81</sup> and only time will tell whether it will ever be accepted as such.

#### 5.4.2 Statutory recognition

It is safe to say<sup>82</sup> that during the 19<sup>th</sup> century the legislative draftsmen did not take cognisance of the electronic bill of lading when drafting the English Carriage of Goods by Sea Act<sup>83</sup> (‘UK

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<sup>74</sup> C Albrecht op cit note 18 at 268.

<sup>75</sup> Ibid at 269.

<sup>76</sup> The case of *The King v Daye* [1908] 2 KB 333 is cited in support of this argument by the authors of ‘Blockchain bills of lading: The end of history: Overcoming paper-based transport documents in Sea Carriage through new technologies’ (2019) 43 *Tul. Mar. L.J.* 269.

<sup>77</sup> *The King v Daye* [1908] 2 KB 333 at 340. The court noted that ‘the medium on which written statements are contained has historically changed from stone, marble, and clay to parchment and later to paper’.

<sup>78</sup> N Chetrit et al op cit note 26 at 106; C Albrecht op cit note 18 at 270; K Takahashi op cit note 51 at 210.

<sup>79</sup> The Bolero bill of lading is not a document of title because it is not a tangible document and most national laws only ‘ascribe “documents of title” to written physical documents’ according to M Dubovec op cit note 16 at 451.

<sup>80</sup> C Albrecht op cit note 18 at 269.

<sup>81</sup> R Aikens, R Lord & M Bools op cit note 12 at 145.

<sup>82</sup> Notwithstanding the fact that the use of electronic data interchange (EDI) dates as far back as the 1980s as noted by I Carr, P Stone op cit note 7 at 105.

<sup>83</sup> 1971 and 1992.

COGSA') or the South African Carriage of Goods by Sea Act<sup>84</sup> ('SA COGSA').<sup>85</sup> The two UK COGSAs<sup>86</sup> and the SA COGSA expressly make reference to 'bills of lading or other documents'. According to Aikens<sup>87</sup> and Wilson<sup>88</sup> both the English common law and statutory regulations provide for the use of a tangible 'document' in the form of a piece of paper which is capable of being 'signed, indorsed and possessed'. Crucially, the expression 'document' does not extend to an intangible document such as the electronic bill of lading.<sup>89</sup>

Notwithstanding the non-recognition of electronic bills of lading by the UK COGSA 1971, in terms of section 1(5) of the UK COGSA 1992 the Secretary of State is entitled to extend the Act to regulate 'a telecom system or any other information technology that is used for effecting transactions'.<sup>90</sup> However, the Secretary of State has to date not exercised his powers under the provision, due to the infrequent use of electronic bills of lading by traders.<sup>91</sup>

In terms of South African legislation, the Sea Transport Document Act 65 of 2000 ('STDA') is applicable to 'any sea transport document'.<sup>92</sup> In terms of section 3(1)(b) of the STDA, sea transport documents may 'be transferred by the holder . . . through the use of a telecommunication system or an electronic or other information technology system'. Therefore, section 3(1)(b) makes provision for sea transport documents to be delivered through electronic means. However, the effect of section 3(1)(b) of the STDA on the use of electronic documents for transfer is limited<sup>93</sup> due to a lack of 'appropriate regulations' to enable the STDA to apply to sea transport documents that are generated through electronic means and never take a tangible form.<sup>94</sup> Moreover, as mentioned in chapter 2<sup>95</sup> the STDA does not specifically regulate the bill of lading as a document of title. It merely states that it regulates 'transferable' or 'negotiable' sea transport documents.<sup>96</sup>

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<sup>84</sup> Act 1 of 1986.

<sup>85</sup> WH van Boom op cit note 3 at 17.

<sup>86</sup> S 1 of UK COGSA 1992.

<sup>87</sup> R Aikens, R Lord & M Bools op cit note 12 at 145.

<sup>88</sup> JF Wilson op cit note 9 at 166.

<sup>89</sup> WH van Boom op cit note 3 at 17.

<sup>90</sup> I Carr, P Stone op cit note 7 at 194.

<sup>91</sup> Ibid.

<sup>92</sup> S 2(1) of the STDA.

<sup>93</sup> J Senekal *The electronic bill of lading: a legal perspective* (unpublished LLM dissertation, North-West University, 2010) 49.

<sup>94</sup> DL Donnelly *An Examination of the Application of the Sea Transport Documents Act 65 of 2000 to Title to Sue under Contracts of Carriage Evidenced by Sea Waybills and Straight Bills of Lading* (unpublished LLM dissertation, University of KwaZulu-Natal, 2013) 134.

<sup>95</sup> See sub sub-paragraph 2.2.2.

<sup>96</sup> S 2(2) of the STDA.

In line with section 1(5) of the UK COGSA 1992, the South African Minister of Transport is entitled, in terms of section 9(1)(a),<sup>97</sup> to amend or extend the STDA's scope to include electronic bills of lading. However, this has not been done.<sup>98</sup> Therefore, the electronic bill of lading is neither regulated nor recognised as a document of title in terms of both English and South African legislation.

## 5.5 *Status as a transferable document*

### 5.5.1 *The notion of transferability and bills of lading*<sup>99</sup>

The bill of lading is commonly referred to as a negotiable document of title as opposed to a transferable document. This has resulted in some confusion as to whether the bill of lading is negotiable or simply transferable.<sup>100</sup> This is an important issue since the two concepts have different legal consequences.

The bill of lading cannot be likened to a bill of exchange since the bill of exchange is recognised by law as a true negotiable instrument.<sup>101</sup> On the other hand, the bill of lading does not function as a negotiable instrument since the endorsement thereof does not transfer it free of encumbrances, meaning, the transferor who endorses a bill of lading to a transferee cannot transfer better title than he possesses.<sup>102</sup> The endorsement of the bill of lading merely provides for its transferability, which means that the *bona fide* holder of the bill can transfer it to the named consignee, who can transfer it onwards to other consignees.<sup>103</sup>

It is argued that no legal justification exists to refer to the bill of lading as a negotiable document and it should rather be referred to as a transferable document to avoid confusion.<sup>104</sup>

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<sup>97</sup> The flexibility of this provision may encourage ministerial regulations to provide for the adoption of EDI measures such as the UNCITRAL Model Law on Electronic Commerce, the Comité Maritime International (CMI) Rules for Electronic Bills of Lading, 1990 or even the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ('Rotterdam Rules'), 2008: see J Hare op cit note 5 at 673. The Rotterdam Rules provide for the 'use and effect of electronic transport documents' in art 8.

<sup>98</sup> DL Donnelly op cit note 94 at 134.

<sup>99</sup> It is beyond the scope of this chapter to discuss the nature of transferability and negotiability in depth and the purpose of this brief discussion is merely to indicate that referring to the bill of lading as a negotiable document is a misnomer. For a very concise discussion on these two concepts see DL Donnelly op cit 94 at 134.

<sup>100</sup> Č Pejović op cit 46.

<sup>101</sup> I Carr, P Stone op cit note 7 at 179.

<sup>102</sup> DYH Lee 'The straight bill of lading: past, present, and future' (2012) 18 *The Journal of International Maritime Law* 39.

<sup>103</sup> Ibid.

<sup>104</sup> I Carr, P Stone op cit note 7 at 179.

### 5.5.2 *The lack of transferability with electronic bills of lading*

The path towards the creation of a functionally equivalent electronic bill of lading has posed many challenges, especially since its status as a transferable document remains questionable. The problem surrounding the transferability of electronic bills of lading stems from the fact that ‘what is transferred is not the paper or EDI message (that being just a medium), but the rights and/or title to the subject of the transaction’.<sup>105</sup> Transferability in the context of paper bills of lading denotes that the bill may be transferred to subsequent parties and the original consignee is legally substituted with the ultimate holder who is then entitled to delivery of the goods.<sup>106</sup> Furthermore, the shipper will no longer have constructive possession of the goods since this right is transferred to the endorsee;<sup>107</sup> that is when a bill of lading is transferred one party loses a right and another party gains said right.<sup>108</sup>

According to Aikens<sup>109</sup> the electronic bill of lading is ‘certainly not a transferable document’. The clarity of his view stems from the fact that in English common law it is not possible to transfer an electronic bill of lading in the same way as a document of title.<sup>110</sup> That is, whilst a transfer through electronic means could effectively give the recipient possession of the electronic document, unlike the transfer of a paper document, it would not deprive the transferor of such possession.<sup>111</sup>

The above is true for electronic systems such as the Bolero system and the CMI Rules’ private key system, but it is argued that the underlying principles of transferability of a paper bill of lading can be realised electronically through to the blockchain system.<sup>112</sup> This is because the tokens issued through the blockchain system are unique, in that the data contained in the tokens are not simply duplicated and distributed and they can only be held by one party at a time.<sup>113</sup> Moreover, the tokens through the ‘scripting function’ of the blockchain are capable of representing the goods.<sup>114</sup>

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<sup>105</sup> J Herd op cit note 52 at 314.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid at 313.

<sup>108</sup> Ibid.

<sup>109</sup> R Aikens, R Lord & M Bools op cit note 12 at 145.

<sup>110</sup> F Arizon, D Semark op cit note 2 fn 84 at 126.

<sup>111</sup> Ibid.

<sup>112</sup> J Herd op cit note 52 at 313.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

## 5.6 *The effect of electronic systems on the presentation rule*

The workings of the three electronic systems discussed above allow for the carrier to remain up to date with the identity of the current holder of the bill of lading. Thus, the carrier will know who is entitled to delivery of the goods without first requiring the physical production of the bill of lading by the consignee. In other words, this system does away with the need for the presentation rule and replaces it with a more convenient process of identification of the party entitled to delivery. Essentially the process of delivery under electronic systems is the same as that of sea waybills.<sup>115</sup> For delivery to be effected the party entitled thereto will merely have to attend at the port of discharge to be identified. Consequently, the abovementioned electronic systems will effectively replace the presentation rule with an ‘e-presentation’ which will lessen the chances of cargo being misdelivered.<sup>116</sup> However, these electronic systems are not necessarily flawless.

## 5.7 *The possible shortcomings of electronic systems*

### 5.7.1 *The Bolero Project*

The Bolero system has a few drawbacks. Two of the more notable issues are first, that it functions as a ‘closed subscription-based system’<sup>117</sup> in that only members are able to use the Bolero system, which might pose a problem for traders who are members but their clients are not. Secondly, the Bolero project’s liability towards its members is limited to ‘US\$100 000 per user per occurrence’.<sup>118</sup> In most instances, this liability amount will not be sufficient to cover the costs arising from misdelivered cargo.

### 5.7.2 *The CMI Rules for electronic bills of lading*

Unlike the Bolero system, the private key system provided for by the CMI Rules is open internationally for any trader to use.<sup>119</sup> However, the CMI Rules have not gained much traction with the international shipping community for various reasons.<sup>120</sup> Dubovec<sup>121</sup> cites several of these. First, the private key system does not solve the issue of transferability, and so the CMI

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<sup>115</sup> F Arizon, D Semark op cit note 2 at 127.

<sup>116</sup> Ibid.

<sup>117</sup> UNCTAD ‘The Use of Transport Documents in International Trade’ 26 November 2003 at 12, available at [https://unctad.org/en/Docs/sdtetlb20033\\_en.pdf](https://unctad.org/en/Docs/sdtetlb20033_en.pdf), accessed on 10 April 2019.

<sup>118</sup> Ibid.

<sup>119</sup> M Dubovec op cit note 16 at 451.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

Rules do not provide for the transferability of contractual rights and duties. Secondly, no provision is made for the passing of ownership in the goods. Thirdly, the CMI Rules were unsuccessful in establishing a ‘comprehensive system or body’ to manage the private key system.<sup>122</sup> Lastly, there are security concerns that stem from the fact that the private keys are not encrypted.<sup>123</sup> Furthermore, there is a concern that the private key system places a ‘disproportionate burden’ on the carrier.<sup>124</sup> Under this system the carrier, who instead of having to issue a set of paper bills of lading once, has the responsibility to reissue a private key every time the bill is transferred.<sup>125</sup>

### 5.7.3 *Blockchain technology*

UNCITRAL<sup>126</sup> noted that although the blockchain electronic bill of lading system is capable of creating a unique data message, the possibility still remains that the message could be fraudulently or mistakenly multiplied. There is also a negative association with the ‘digital black market’.<sup>127</sup>

### 5.7.4 *General issues relating to electronic alternatives*

There are a number of problems that relate to electronic alternatives in general. Some of the general issues are as follows:

- First, in all three instances mentioned above, be it the central registry, private key or blockchain system, a financing bank will be obliged to actively participate in obtaining delivery of the goods at the port of discharge.<sup>128</sup> Moreover, none of these systems will prevent a financing bank from delaying the delivery of the goods until it receives payment from its client for financing the sale.<sup>129</sup>
- Secondly, electronic alternatives are not completely immune from fraudulent activities, as was seen in the *MSC Mediterranean Shipping Company SA v Glencore International*

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<sup>122</sup> M Dubovec op cit note 16 at 451.

<sup>123</sup> Ibid.

<sup>124</sup> DA Bury op cit note 49 at 217.

<sup>125</sup> Ibid.

<sup>126</sup> United Nations Commission on International Trade Law (UNCITRAL) ‘Report of the Working Group on electronic data interchange (EDI) on the work of its thirtieth session’ (1996) UN Doc No. A/CN.9/421 at 3.

<sup>127</sup> DA Bury op cit note 49 at 234.

<sup>128</sup> F Arizon, D Semark op cit note 2 at 128.

<sup>129</sup> Ibid.

AG.<sup>130</sup> This case dealt with the misdelivery of cargo as a result of the use of an ‘electronic release system’ (‘ERS’) that was ‘hacked’ by fraudsters.<sup>131</sup>

- Thirdly, there is no international framework in place to sufficiently regulate any of the electronic systems discussed above. Neither The Hague<sup>132</sup> nor The Hague-Visby Rules<sup>133</sup> provide for the regulation of electronic bills of lading. However, the Rotterdam Rules<sup>134</sup> seek to provide a solution to the non-regulation of electronic bills of lading by proposing to regulate the bill through:

‘... a general principle of equivalence between electronic and paper communications subject to the proviso that the use of an electronic bill must have the express or implied consent of the carrier and the shipper involved.’<sup>135</sup>

Nevertheless, the Rotterdam Rules are not yet in force, and it remains to be seen whether the Convention will receive the required support.<sup>136</sup> In 2017, The United Nations Commission on International Trade Law (‘UNCITRAL’) adopted the Model Law on Electronic Transferable Records (‘MLETR’),<sup>137</sup> which aims to regulate the international and domestic use of transferable electronic records.<sup>138</sup> None of the major states has enacted MLETR.<sup>139</sup> Consequently, electronic bills of lading remain largely unregulated. The non-regulation is one of the primary pitfalls of electronic alternatives since it creates uncertainty amongst parties in respect of their respective contractual rights and duties.<sup>140</sup>

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<sup>130</sup> [2017] 2 Lloyd’s Rep 186.

<sup>131</sup> The ERS system was used by the port of Antwerp, in which the bill of lading is given to the carrier who through electronic means sends the receiver and the port authority a PIN code. The receiver then keys in the code at the terminal to get entry to collect the cargo from the carrier. This system enjoyed success for about 18 months. However, the ERS system backfired in June 2012 as a result of fraudulent activities. In this case the carrier discharged the cargo into its Antwerp compound and issued the receiver’s local agents with the necessary PIN codes to collect the said cargo. Subsequently, one of the parties’ computers was hacked and the hackers used the PIN code to retrieve the cargo before the receiver’s agent could collect it, resulting in a claim for misdelivered cargo.

<sup>132</sup> International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (‘Hague Rules’) 1924.

<sup>133</sup> The Hague Rules as amended by the Brussels Protocol (Hague-Visby Rules) 1968.

<sup>134</sup> Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (‘Rotterdam Rules’), 2008.

<sup>135</sup> JF Wilson op cit note 9 at 166. The requirement of consensus is in terms of art 8 of the Rotterdam Rules.

<sup>136</sup> C Albrecht op cit note 18 at 267.

<sup>137</sup> The MLETR is available at [https://www.uncitral.org/pdf/english/texts/electcom/MLETR\\_ebook.pdf](https://www.uncitral.org/pdf/english/texts/electcom/MLETR_ebook.pdf).

<sup>138</sup> UNCITRAL ‘UNCITRAL Model Law on Electronic Transferable Records (2017)’, available at [https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic\\_transferable\\_records](https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_transferable_records), accessed on 10 November 2019.

<sup>139</sup> To date only one country has enacted the MLETR – Bahrain. See ‘UNCITRAL Model Law on Electronic Transferable Records (2017)’, available at [https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic\\_transferable\\_records/status](https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_transferable_records/status), accessed on 10 November 2019.

<sup>140</sup> J Herd op cit note 52 at 309.



## 5.6 Conclusion

Through the use of electronic systems, such as the ones discussed in this chapter, it is possible to create an electronic bill of lading that is transferable and can function as a document of title. However, this possibility depends on the enactment of legal reforms; until the law recognises the electronic bill of lading as a transferable bill of lading, its functions will be restricted to that of a receipt and evidence of the contract of carriage.

Nevertheless, the employment of electronic alternatives will eventually result in the presentation rule being replaced with an ‘electronic presentation’.<sup>141</sup> However, this eventuality depends on the replacement of the paper bill of lading, which will not happen overnight. Furthermore, traders may be deterred by the various shortcomings of electronic alternatives, since it would essentially result in replacing one set of problems with another.

It is also maintained that the only reason the paper bill of lading has remained in use, is due to the banking industry recognising it as a valid form of security.<sup>142</sup> Thus, banks prefer to deal with paper bills of lading, due to their function as a transferable document of title, as opposed to non-transferable electronic bills of lading.<sup>143</sup> The bank’s preference stems from the fact that the bill of lading may be endorsed and delivered to it, therefore, entitling it to delivery of the cargo. However, banks remain exposed to the consequences of the presentation rule. The next chapter considers the consequences of the misdelivery of the cargo due to the non-production of the bill of lading from the perspective of a bank as endorsee of the bill of lading.

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<sup>141</sup> F Arizon, D Semark op cit note 2 at 127.

<sup>142</sup> KT McGowan ‘The Dematerialisation of the Bill of Lading’ (2007) 7 *Hibernian L.J.* 103.

<sup>143</sup> M Dubovec op cit note 16 at 447.

## CHAPTER 6

### *A FINANCING BANK'S RIGHT TO CLAIM DAMAGES FOR MISDELIVERED CARGO*

#### 6.1 Introduction

Unlike the carrier, a bank is not directly involved in the carriage of the goods. A bank's assistance is generally required by a buyer in order to secure financing for sales transactions. In order for a bank to be in a position to finance a sales transaction it will require security from the buyer. The function of the bill of lading as a transferable document of title enables traders to use the bill as a form of security. This well-established form of security is recognised by banks<sup>1</sup> since the transfer of the bill of lading will entitle the bank to constructive possession of the goods.<sup>2</sup> Therefore, the constructive delivery<sup>3</sup> of the goods allows sellers and buyers to pledge the bill of lading to the bank as security in return for either a loan or letters of credit.<sup>4</sup>

The bill of lading is pledged to the bank through the endorsement of the bill of lading.<sup>5</sup> If the bank is satisfied that the bill of lading meets its requirements, it will accept presentation and delivery thereof. For example, a bank will not accept a 'claused' bill of lading.<sup>6</sup> The bank

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<sup>1</sup> JF Wilson *Carriage of Goods by Sea* 7 ed (1988) 133.

<sup>2</sup> P Todd *Bills of lading and bankers' documentary credits* 4 ed (1990) 183. Thus the bank will be in the 'same commercial position as if the goods were in [its] physical possession and [it] is entitled to have the goods delivered to [it] to the exclusion of others' as stated by SD Girvin 'Carriage by Sea: The Sea Transport Documents Act 2000 in Historical and Comparative Perspective' (2002) 119 *S. African L.J.* 326.

<sup>3</sup> As discussed in chapter 2, the bill of lading's function as a document of title allows for the constructive possession of the goods to be transferred to the holder of a bill – see sub-subparagraphs 2.2.1, 2.3.2 and 2.4.2. The bill of lading is essentially a 'symbol' of the goods, and upon the transfer of the bill the transferee 'symbolically' gains possession of the goods themselves as read at R Colivaux *Carver's Carriage by Sea* 12 ed (1971) 886.

<sup>4</sup> M Dubovec 'The Problems and Possibilities for Using Electronic Bills of Lading as Collateral' (2006) 23(2) *AJICL* 437. Letters of credit are not the only mode of payment available to buyers. There are other forms of payment such as an open account, bills of exchange and documentary bills. However, letters of credit are the more secure option. It is also the more commonly used mode of payment and has been described by the English courts as 'the lifeblood of international commerce' reported by I Carr, P Stone *International Trade Law* 6 ed (1995) 454. Therefore, this chapter will operate within the notion of a bank that has issued a letter of credit for the financing of a sales transaction.

<sup>5</sup> There are various banks that play a role under a letter of credit agreement, namely an advising bank, confirming bank, issuing bank and nominated bank. The bank that will normally effect payment to the seller under the letter of credit agreement is the nominated bank. The nominated bank then claims reimbursement from the issuing bank. The buyer then reimburses the issuing bank. See C Hugo 'Discounting practices and documentary credits' (2002) 119(1) *S. African L.J.* 101.

<sup>6</sup> In terms of art 27 of the Uniform Customs & Practice for Documentary Credits (UCP 600), a bank will only accept a clean transport document. A clean transport document is 'one which bears no clause or notation which expressly declares a defective condition of the goods and/or the packaging'.

holds the bill of lading as security in order to recover the funds it has paid to the named beneficiary.<sup>7</sup>

The bank, in taking the bill of lading as security, has constructive possession of the goods. However, the carrier has physical custody of the goods. Should the carrier misdeliver the cargo to a party not entitled thereto, the bank will lose its security. Consequently, the bank will be left with no recourse against its client if the latter fails to honour the credit agreement. In these circumstances, the bank will seek to institute a claim against the carrier for damages. The bank's claim may, however, be met with the defence that it is not the rightful holder of the bill of lading since it is merely holding the bill of lading as security and does not have the required intention to possess the bill of lading.

This chapter considers the bank's right, as an endorsee, to sue a carrier for the misdelivery of cargo owing to the non-presentation of the bill of lading under English and South African law. First, it will briefly be considered whether the transfer of the bill of lading to the bank under a letter of credit agreement constitutes a pledge or a mortgage. Secondly, the relevant English and South African statutory provisions will be examined to determine a bank's right of suit as endorsee of the bill of lading.

## 6.2 *The effect of the transfer of the bill of lading to a bank*

When a bill of lading is transferred through endorsement to a bank as security, the parties to the transaction do not always characterise the nature of the said security, which subsequently gives rise to the issue regarding whether the transfer constitutes a pledge or a mortgage.<sup>8</sup>

### 6.2.1 *The nature of a pledge*

A pledgor (the debtor) transfers possession of the pledge (the property which is being used as security) to the pledgee (the creditor).<sup>9</sup> Therefore, a pledge is similar to a bailment since the pledge remains in the custody of the pledgee until the outstanding loan is repaid.<sup>10</sup> The effect of a transfer under a pledge is that a pledgee acquires a 'special property in the pledge'.<sup>11</sup>

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<sup>7</sup> *Standard Chartered Bank v Dorchester LNG (2) Ltd ('The 'Erin Schulte')* [2015] 1 Lloyd's Rep 97 at 102.

<sup>8</sup> R Colinvaux op cit note 3 at 913.

<sup>9</sup> M Bridge *Personal Property Law* 4 ed (2002) 277.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

### 6.2.2 *The nature of a mortgage*

A mortgagor transfers property to a mortgagee through a conveyance or assignment as security for the repayment of any funds advanced.<sup>12</sup> The mortgagor normally remains in possession of the property. However, unlike a pledge, possession of the property is not a requirement for a mortgage<sup>13</sup> and the mortgagee acquires a ‘general property in the goods’.

### 6.2.3 *Transfer of the bill of lading to a bank – a pledge or mortgage*

There is a key difference between a pledge and a mortgage.<sup>14</sup> In terms of a mortgage agreement, the property in the goods is acquired by the transferee;<sup>15</sup> whereas, under a pledge agreement, the property in the goods is retained by the pledgor who is entitled to transfer it during the duration of the agreement.<sup>16</sup>

The issue of the transfer of the bill amounting to a pledge or a mortgage will turn on the intention of the transferor to either surrender the physical possession of the goods or the special property in the goods.<sup>17</sup> However, this issue will have to be determined on a case by case basis, as will be seen from the cases to follow.

The court in *Mirabita v Imperial Ottoman Bank* (1878) 3 Ex.D. 164 considered the terms of both the credit agreement and sales agreement to determine the intention of the transferor. It was held that the property in the goods did not pass to the transferee since the property passed in terms of the sales contract from the seller to the consignee upon payment being tendered by the latter.<sup>18</sup>

In *Sewell v Burdick* (1883) 10 Q.B.D. 363, the bill of lading was endorsed by the shipper in blank and subsequently deposited with the banker as security for a loan. The court *a quo* held that the transferor’s intention was merely to pledge the goods to the transferee – in other words, to vest in the transferee the possession over the goods. However, the general property in the goods remained with the transferor. However, the court *a quo*’s decision was overturned by the Court of Appeal,<sup>19</sup> which held that through the endorsement of the bill of lading the ‘legal property’ passed in the goods to the endorsee (transferee).<sup>20</sup> Consequently, the shipper

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<sup>12</sup> M Bridge op cit note 9 at 281.

<sup>13</sup> Ibid.

<sup>14</sup> R Colinvax op cit note 3 at 913.

<sup>15</sup> Ibid.

<sup>16</sup> M Bridge op cit note 9 at 278.

<sup>17</sup> Ibid at 266.

<sup>18</sup> *Mirabita v Imperial Ottoman Bank* (1878) 3 Ex.D. 164 at 171.

<sup>19</sup> *Sewell v Burdick* (1884) 13 Q.B.D 159 at 167 – 168.

<sup>20</sup> *Sewell v Burdick* supra at 169.

was left with an 'equitable interest' in the goods.<sup>21</sup> The House of Lords<sup>22</sup> reversed the Court of Appeal's decision and restored the court *a quo*'s judgment. Consequently, depending on the intention of the parties, the pledging of the bill of lading to a bank will transfer to it a 'special property' as opposed to a 'general property' in the goods.<sup>23</sup>

The transfer of a special property in the goods to the bank vests in it the right to 'obtain delivery of the goods when they arrive, and (if necessary) to realise them for the purpose of the security'.<sup>24</sup> That is, the bank as a pledgee and holder of a 'special legal title' has the right to receive, retain and if necessary, sell the goods in order to settle the debt owed to it by the pledgor.<sup>25</sup> However, this special right does not include the enjoyment of the goods.

Notwithstanding the countervailing court decisions discussed above, it is generally recognised by legal authors<sup>26</sup> that the deposit of a bill of lading with a bank as security for an advance, constitutes a pledge. However, there is nothing precluding the parties from structuring the transaction as a mortgage.<sup>27</sup>

Nevertheless, in both instances, whether the transfer of the bill of lading is categorised as a pledge or mortgage, the end result remains the same, namely the endorsement of the bill to the bank is a constructive delivery of the goods. Therefore, the bank will in both instances have constructive possession over the goods. However, under English common law, the constructive possession does not in itself transfer the right of suit to the bank as a holder of the bill.<sup>28</sup> Consequently, the holder of the bill of lading does not have the legal standing to bring an action against a carrier for misdelivery of the cargo.

### 6.3 *Financing bank's right to sue the carrier*

As mentioned previously, the bank is not a party to the contract of carriage evidenced by the bill of lading. In terms of English common law and the doctrine of 'privity of contract'<sup>29</sup> the

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<sup>21</sup> *Sewell v Burdick* supra note 19 at 164.

<sup>22</sup> *Sewell v Burdick* (1884) 10 A.C. 74.

<sup>23</sup> R Aikens, R Lord & M Bools *Bills of Lading* 2 ed (2015) 367.

<sup>24</sup> *Sewell v Burdick* supra note 22 at 82.

<sup>25</sup> P Todd op cit note 2 at 155.

<sup>26</sup> M Bridge op cit note 9 at 280; P Todd op cit note 2 at 8; GH Treitel, FMB Reynolds & TG Carver *Carver on Bills of Lading* 3ed (2011) 209.

<sup>27</sup> M Bridge op cit note 9 at 280.

<sup>28</sup> R Aikens, R Lord & M Bools op cit note 23 at 245.

<sup>29</sup> This doctrine in the narrow sense provides that 'only the original parties to the contract can sue or be sued on it. Thus a third party, such as the consignee or endorsee of a bill of lading, could not take the benefit of the term of a contract between two other parties and neither would he be bound by the terms of this contract' as read at SD Girvin op cit note 2 at 327.

bank as a third party does not have the right to sue in terms of the contract of carriage.<sup>30</sup> The right of suit under the carriage contract does not transfer with the endorsement of the bill of lading. This eventuality has been remedied through statutory intervention. Thus, a bank's right of suit depends on statutory provisions. The transfer of rights of suit to the holder of a bill of lading in terms of English law is provided for by the United Kingdom Carriage of Goods by Sea Act 1924 ('UK COGSA 1924') and in terms of South African law, by the Sea Transport Document Act 65 of 2000 ('STDA').

#### 6.4 *Rights of suit under the UK COGSA 1924*

Section 2(1)(a) of UK COGSA 1924 vests the right of suit under a contract of carriage in the 'holder' of the bill of lading. The term 'holder' in respect of endorsees, denotes 'a person with possession of the bill as a result of the completion, by delivery of the bill, of any endorsement of the bill.'<sup>31</sup> The terms 'possession' and 'delivery' are, however, not defined in the Act.

##### 6.4.1 *The meaning of possession<sup>32</sup> and delivery*

The meaning of the term 'possession' will vary depending on the context in which it is used. Nevertheless, a good point of departure is to consider the 'conventional meaning' of the word.<sup>33</sup> In the normal sense, possession denotes the 'physical control which is exercised over a thing (detention), coupled with an intention to possess (*animus possidendi*)'.<sup>34</sup> The term 'possession' is more restricted than the 'right to possession'.<sup>35</sup> Therefore, in accordance with the natural meaning of the word, a party will only be considered the holder of the bill, if it has 'actual custody' thereof. Alternatively, actual custody could also be where the bill is held on behalf of the holder by an agent and the agent has no independent rights thereto.<sup>36</sup>

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<sup>30</sup> R Aikens, R Lord & M Bools op cit note 23 at 365.

<sup>31</sup> S 5(2)(b) of UK COGSA 1924.

<sup>32</sup> The term possession has given rise to many obstacles in English case law. For example the judge in *Towers & Co Ltd v Gray* [1961] 2 QB 351 (CA) 361 noted that 'the term "possession" is always giving rise to trouble' as read at M Tselentis 'The concept of the "holder" of a bill of lading under COGSA, 1924' May 2015, available at <http://www.arbitrage-maritime.org/fr/Gazette/G38complement/MichaelTselentis.pdf>, accessed on 31 October 2019.

<sup>33</sup> M Tselentis op cit note 32.

<sup>34</sup> Ibid.

<sup>35</sup> R Aikens, R Lord & M Bools op cit note 23 at 374.

<sup>36</sup> Ibid; According to Todd, 'a person can have physical custody, but on behalf of someone else and it is the someone else who has contractual rights under the bill of lading': P Todd *Principles of the Carriage of Goods by Sea* (2016) 278.

The term ‘delivery’ is also not defined in the Act. Tselentis<sup>37</sup> relies on the definition provided for in *Statoil Petrokemi AB v. Stargas Ltd.* (The ‘Berge Sisar’).<sup>38</sup> The ordinary meaning of the word ‘deliver’ is ‘the voluntary transfer of possession from one person to another’.<sup>39</sup> However, the court was not considering the term delivery in the context of section 5(2)(b) of COGSA 1992 but terms of section 3 of COGSA 1992. Section 3 deals with the ‘taking or demanding delivery of the goods from the carrier’, whereas section 5(2)(b) refers to ‘the completion, by delivery of the bill, of any endorsement’. Therefore, it was held that the term delivery in the context of section 5(2)(b) is a ‘more complex expression which is capable of denoting something more than mere physical delivery’.<sup>40</sup>

#### 6.4.2 A bank’s holdership status under section 5(2)(b)

The ambiguity surrounding the meaning of the terms ‘possession’ and ‘delivery’ has caused some uncertainty surrounding the ‘holdership’ status of banks, since the bank is an independent contractor that acts as an agent for the buyer.<sup>41</sup> The bank in its capacity as agent ‘holds the bill of lading at the disposal of the transferor which, by reason of its contractual relationship with the transferee, has constructive possession’.<sup>42</sup>

The issue of whether a bank has the *locus standi* as the lawful holder of the bill of lading to sue a carrier for misdelivering the cargo without the production of the bill of lading was considered in the recent English case of *Standard Chartered Bank v Dorchester LNG Limited*<sup>43</sup> (The ‘Erin Schulte’). The facts of the case are quite complex.<sup>44</sup> Essentially it involved the endorsement of a bill of lading by the seller to the bank under a letter of credit agreement. The bank ‘wrongly’<sup>45</sup> rejected the tender of the documents and advised the seller’s bank that it was holding the bill of lading to the seller’s order.<sup>46</sup> The carrier subsequently delivered the cargo against a letter of indemnity (issued by the seller) to the buyer. The seller maintained that the documents presented to the bank were in order and insisted on payment under the letter of credit. The bank refused to entertain the seller’s request for payment. The bank eventually paid

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<sup>37</sup> M Tselentis op cit note 32.

<sup>38</sup> [2002] 2 AC 205 (H/L).

<sup>39</sup> M Tselentis op cit note 32.

<sup>40</sup> *Standard Chartered Bank v Dorchester LNG Limited (The ‘Erin Schulte’)* [2015] 1 Lloyd’s Rep 97 at 104.

<sup>41</sup> M Tselentis op cit note 32.

<sup>42</sup> Ibid.

<sup>43</sup> [2013] EWHC 808 (Comm); [2015] 1 Lloyd’s Rep 97.

<sup>44</sup> This case involves the resale of the cargo carried on two separate vessels and the amendment and transferring of multiple letters of credit.

<sup>45</sup> R Aikens, R Lord & M Bools op cit note 23 at 376.

<sup>46</sup> *The Erin Schulte* supra note 40 at 97.

the seller in terms of the letter of credit agreement, but only after the seller instituted proceedings against it. The bank consequently sought to recover its loss from the owner of the MV Erin Schulte. The issue in dispute was whether

‘. . . the mere transfer of possession of a bill of lading [is] sufficient to constitute completion of an indorsement by delivery, or is it necessary that the transferor and transferee should both intend that the rights under the bill of lading should pass from one to the other by reason of the combined effect of the indorsement and the transfer of possession?’<sup>47</sup>

The point of departure for the court was to consider section 5(2) of COGSA 1992. The court held that consignees and endorsees are treated differently in terms of this section.<sup>48</sup> On the one hand, a named consignee becomes the holder of the bill of lading, merely through being in possession of the bill;<sup>49</sup> on the other hand, an endorsee will only become the holder of the bill of lading on the completion of the endorsement by delivery of the bill of lading.<sup>50</sup> The reason for this distinction stems from the fact that unlike the consignee (who is named in the bill of lading and to whom the carrier agreed to deliver), the endorsee’s position depends on the decision of an existing holder.<sup>51</sup> Therefore, while the holder has the bill in its hands and, should it deem it necessary, can revoke or vary the endorsement, the endorsement will only be irrevocable once the bill of lading is delivered to the endorsee, and only then will the right of suit which it presents come into effect. According to Moor-Bick LJ: ‘Delivery . . . represents an essential element in a series of voluntary acts designed to give effect to the holder’s intention to transfer the rights which it represents.’<sup>52</sup>

Therefore, the mere physical delivery of the bill of lading is not sufficient to render a person the lawful holder of the bill of lading.<sup>53</sup> A person will only be rendered the lawful holder

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<sup>47</sup> *The Erin Schulte* supra note 40 at 101.

<sup>48</sup> However, in *East West Corporation v DKBS 1912* [2002] 2 Lloyd’s Rep 182 the court found that there was no material difference between the position of a consignee and that of an endorsee. The court in *The Erin Schulte*, disagreed with the court’s observation: *The Erin Schulte* supra note 40 at 104.

<sup>49</sup> S 5(2)(a) of COGSA 1992.

<sup>50</sup> S 5(2)(b) of COGSA 1992.

<sup>51</sup> *The Erin Schulte* supra note 40 at 102.

<sup>52</sup> *Ibid.*

<sup>53</sup> This finding is contrary to that of the Singapore Court of Appeal in *Keppel Tatlee Bank Ltd v Bandung Shipping Pte Ltd* [2003] 1 Lloyd’s Rep 619. In this case the buyer delivered the bill of lading directly to Keppel Tatlee (the ‘claimant bank’) who then indorsed it to the sub-buyer’s bank, State Bank of Saurashtra (SBS). However, due to the sub-buyer’s non-compliance, SBS returned the bills of lading to the claimant bank, without re-endorsing the bills in the latter’s favour. Subsequently, the carrier delivered the cargo to the sub-buyer without the production of the bill of lading. The claimant bank accordingly sought to claim from the carrier for the misdelivery of cargo. The Court of Appeal held that without the re-endorsement of the bill of lading in the claimant bank’s favour by SBS, the claimant bank did not acquire the rights of suit under the contract of carriage. The reasoning for this is that by ‘adding the name of [SBS] to create a special endorsement and delivering the bills to it, the [claimant bank] had intended to vest the rights of suit in [SBS] with a view to



if it is the intention of the endorser to transfer the bill of lading and the endorsee has the intention of accepting it.<sup>54</sup> The intention on the part of the endorsee as a requirement is justified on the grounds that a party cannot be forced (unless it is under an obligation to do so) to ‘accept a transfer of property or rights against his will’.<sup>55</sup> Therefore, a bank cannot be forced to accept the presentation of the bill of lading under a letter of credit agreement. However, if a bank elects to reject the presentation of the bill, it will not become the holder thereof and will not acquire the right of suit.

It is submitted by Tselentis<sup>56</sup> that the rationale for Moore-Bick LJ’s distinction between endorsees and consignees is flawed. It goes against the English Law Commission’s recommendation that no particular distinction is to be drawn between a named consignee and an endorsee of a bill of lading.<sup>57</sup>

Another aspect that will influence the bank becoming a holder under section 5(2)(b) of COGSA 1992, is the court’s finding that the Act permits a conditional delivery of the bill of lading. According to Moore-Bick LJ:

‘[The purpose of the Act] was to enable the right of suit embodied in a bill of lading to pass independently of title to the goods. If the mere indorsement of the bill is ineffective of itself to pass the right of suit, there is no reason in principle why the bill should not be delivered to the indorsee on a conditional basis. Unless and until the condition is satisfied, the indorsee holds the bill to the order of the indorser as his agent. No third party interests are involved because, unless and until the delivery becomes unconditional, the bill can be returned and the indorsement cancelled. The concept of delivering deeds and other documents in escrow is well established in relation to the bills of exchange.’<sup>58</sup>

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enabling it in its turn to transfer the rights to the [sub-buyer].’ The court in *The Erin Schulte* disagreed with the suggestion by the Singapore Court in its judgment at para 23 that the mere physical delivery of the bills to SBS was sufficient to render it the lawful holder as read at *The Erin Schulte* supra note 40 at 104.

<sup>54</sup> The court in *The Erin Schulte* relied on the only previous authority, namely *Aegean Sea Traders Corporation v Repsol Petroleo SA (The ‘Aegean’ Sea)* [1998] 2 Lloyd’s Rep 39 for support in reaching this conclusion. The court also referred to the views expressed by various legal authorities such as the editors of *Carver on Bills of Lading*, editors of *Scrutton on Charterparties*, and the authors of *Bills of Lading*. None of these authors maintain a view contrary to that of the court on the point of intention.

<sup>55</sup> *The Erin Schulte* supra note 40 at 102. According to Todd, one would be hard pressed to disagree with the court on this point: P Todd op cit note 36 at 280.

<sup>56</sup> M Tselentis ‘The concept of the “holder” of a bill of lading under COGSA, 1992’ (2015), available at <http://www.arbitrage-maritime.org/fr/Gazette/G38complement/MichaelTselentis.pdf>, accessed on 31 October 2019.

<sup>57</sup> The English Law Commission and the Scottish Law Commission Report (Law com No.196) (Scot Law Com No. 130) *Right of suit in Respect of Carriage of Goods by Sea* (1991) para 2.22.

<sup>58</sup> *The Erin Schulte* supra note 40 at 104.

However, the validity of the court's analogy with bills of exchange is also questioned, since the Bills of Exchange Act 1882 specifically provides for 'conditional delivery of a bill of exchange, and the concept of a conditional delivery is well known in that context'.<sup>59</sup> Nevertheless, the Court of Appeal held (in the context of section 5(2)(b)) that the 'completion of an indorsement by delivery' requires a 'voluntary and unconditional transfer of possession by the holder to the indorsee and unconditional acceptance by the indorsee'.<sup>60</sup>

The result of the Court of Appeal's judgment is that section 5(2)(b) permits a conditional delivery of endorsed bills of lading to a transferee, who does not become the 'holder' until the condition is fulfilled.<sup>61</sup> Consequently, the transfer of rights of suit will depend on the transfer of the bill of lading being free from any conditions. That is, if a seller endorses the bill of lading to the bank on condition that payment is made to complete the endorsement, a bank will only become the holder of the bill of lading and have the right of suit on condition that it has effected payment under the letter of credit agreement.

It is submitted by Tselentis<sup>62</sup> that this judgment is not in line with the 'certainty and simplicity' of the COGSA 1992 regime, and is likely to have 'troublesome commercial consequences' for international trade and carriage of goods by sea.<sup>63</sup>

## 6.5 *Rights of suit under the Sea Transport Document Act 65 of 2000*

### 6.5.1 *The holder of the bill of lading*

The holder of the bill of lading is determined in terms of section 3(1) and (2) of the Sea Transport Document Act (the Act); a person will be the holder if that 'person is in possession' of the original sea transport document<sup>64</sup> and the document is transferred to it by way of endorsement and delivery (as may be necessary).<sup>65</sup> Section 3(2) also provides for instances where a person holds the bill of lading on behalf of another person.

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<sup>59</sup> M Tselentis op cit note 32.

<sup>60</sup> *The Erin Schulte* supra note 40 at 104.

<sup>61</sup> M Tselentis op cit note 32.

<sup>62</sup> Michael Tselentis QC was counsel for the appellant in *The Erin Schulte* supra note 40 at 99.

<sup>63</sup> Tselentis discusses the possible consequences of this judgment on buyers and sub-buyers at 17 - 19 of M Tselentis op cit note 32.

<sup>64</sup> In terms of section 1 of the STDA, a sea transport document includes *inter alia* a bill of lading.

<sup>65</sup> The requirement of endorsement and delivery to give effect to the transfer of the bill of lading and the rights of suit is similar to that of the provisions under the UK COGSA 1992.

### 6.5.2 *The requirement of possession in terms of section 3(2)*

The term ‘possession’ is likewise not defined by the Act. However, it is submitted that the term possession may take on the same meaning as that discussed above in subheading 6.4.1. This submission is supported by the fact that under South African common law, both physical control (*corpus*) and intention (*animus possidendi*) are requirements for the ‘possession’ of a thing.<sup>66</sup> Therefore, the requirement of possession entails that a person must have physical control of the bill accompanied by the necessary intention to possess it.

### 6.5.3 *The transfer of rights of suit to endorsees*

In terms of section 4(1)(a) of the Act, the rights and obligations under the contract of carriage transfer to the lawful holder of the bill of lading. Therefore, in terms of this section, the lawful holder of the bill of lading is subject to the same contractual obligations as the carrier and the shipper.<sup>67</sup> However, the lawful holder is also ‘entitled to the same rights as the shipper or endorsee would have against the carrier as if the lawful holder was a party to the contract of carriage’.<sup>68</sup>

Section 4(1)(a) does not create an ideal situation for banks to whom the bill is endorsed under a letter of credit agreement, since a bank is not concerned with becoming a party to the contract carriage and acquiring liabilities towards the carrier.<sup>69</sup> However, in the same context, a bank will wish to have the right of suit to institute an action against a carrier that breaches its duty in terms of the carriage contract to deliver the cargo against the presentation of the bill of lading by misdelivering the cargo.

There are no reported judgments that have considered a bank as the lawful holder of the bill of lading (holding it merely for the purpose of security) under the provisions of the Act.<sup>70</sup> In these circumstances, it would be difficult to discern a bank’s title to sue a carrier for the misdelivery of cargo, under the STDA. However, since sections 3(1) and (2) of the STDA are essentially the same as sections 2(1) and 5(2) of the UK COGSA 1992, it would be fair to assume that the South African courts will look to the English courts for guidance on this issue.

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<sup>66</sup> S Scott *Property Law* (2016) 90.

<sup>67</sup> Section 4(1) of the STDA refers to the ‘person by whom or on whose behalf the document was issued’.

<sup>68</sup> A Robinson, P Lamb ‘Transmission of rights’, *LexisNexis* available at:

<https://www.mylexisnexis-co-za.ukzn.idm.oclc.org/Index.aspx#>, accessed on 10 November 2019.

<sup>69</sup> DL Donnelly *An Examination of the Application of the Sea Transport Documents Act 65 of 2000 to Title to Sue under Contracts of Carriage Evidenced by Sea Waybills and Straight Bills of Lading* (unpublished LLM dissertation, University of KwaZulu-Natal, 2013) 132.

<sup>70</sup> An extensive search was undertaken to find reported decisions by the South African courts on this point.

## 6.6 *Conclusion*

From the above discussion, it is evident that there are various uncertainties regarding a financing bank's right, as endorsee and holder of the bill of lading, to sue a carrier for the misdelivery of cargo under English law and more so under South African law. One thing that is, however, very clear is that under English law the bank will only become the holder of the bill of lading and acquire the right of suit under English law if this is the intention of both the transferor and the bank as transferee. This will also depend on the transfer of the bill of lading being unconditional.

## **CHAPTER 7**

### **CONCLUSION**

#### *7.1 Introduction*

The delayed arrival of the bill of lading places a burden on a carrier, who has a duty to deliver the cargo against the presentation of the bill. More often than not, a carrier will risk delivering the cargo without the production of the bill of lading or will insist on delivering against a letter of indemnity. As long as transferable bills of lading remain in use, carriers will continue to circumvent the presentation rule through these perilous practices.

The objective of this study is to determine whether the presentation rule is a necessary evil and to examine the legal implications of the misdelivery of cargo, owing to the non-presentation of the bill of lading, on the rights and duties of carriers and endorsees. In this chapter, the main findings with regard to the sub-research questions are established and presented. This chapter further offers recommendations for immediate and future implementation.

#### *7.2 Findings on each sub-research question*

The findings are established in the context of the four sub-research questions set in chapter 1 of this dissertation.

##### *7.2.1 Sub-research question No. 1:*

The relevant provisions of The Hague-Visby Rules<sup>1</sup> were examined, and various judicial decisions and academic opinions were considered. This examination rendered the following results:

##### *1. The applicability of The Hague-Visby Rules to claims resulting from the misdelivery of cargo:*

The applicability of The Hague-Visby Rules to claims resulting from the misdelivery of cargo has not definitively been decided on by the English courts. However, the English courts have

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<sup>1</sup> The Hague Rules as amended by the Brussels Protocol (Hague-Visby Rules) 1968.

held that The Hague Rules<sup>2</sup> do not apply to claims arising post-discharge. It may well be argued that the English courts will reach the same conclusion on the applicability of The Hague-Visby Rules since there is no material difference in the wording of the provisions regulating the applicability of these two Conventions. This argument is also supported by various academic opinions discussed in chapter 3. Since misdelivery claims arise post-discharge it will not be covered by either The Hague or Hague-Visby Rules. However, the parties to the contract of carriage are entitled to extend the application of The Hague-Visby Rules post-discharge.

Consequently, the general application of The Hague Visby Rules is restricted to claims arising before the discharge of the cargo. The non-applicability of the Rules does not necessarily preclude a carrier from relying on provisions which by their wording are extended to the delivery of the cargo, such as the time bar provision.

2. *Whether the one-year time bar created by The Hague-Visby Rules applies to claims where the carrier has delivered the cargo to a third party without production of the original bill of lading:*

A carrier will be able to rely on the time-bar provision in terms of The Hague-Visby Rules since the amendment of this provision effectively widened the scope of its application rendering it applicable to the delivery of the cargo. Consequently, a carrier will be able to defend a cargo owner's claim for misdelivery if the claim is instituted one year after the delivery of the cargo. However, the Hague Rules, which contains the un-amended time-bar provision, will only apply subject to the misdelivery of the cargo occurring during the 'tackle to tackle' period of responsibility.

3. *Whether carriers can rely on the 'package limitation' if found liable for damages as a result of the misdelivery of cargo owing to the non-presentation of the original bill of lading.*

Unlike the time bar provision, the carrier will not be entitled to rely on the package limitation provision to limit the cargo owner's claim for misdelivery. This converse outcome is due to the difference in the wording of these two provisions (this was discussed in chapter 3). Consequently, this may have dire financial consequences for the carrier since it will be liable for the full amount of the cargo owner's claim.

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<sup>2</sup> International Convention for the Unification of Certain Rules of Law relating to Bills of Lading ('Hague Rules') 1924.

#### *7.2.2 Sub-research question No. 2:*

An analysis of the enforceability of letters of indemnity in light of recent English judicial decisions indicates that a carrier that delivers cargo against a letter of indemnity (in the absence of the bill of lading) will only be at risk of not being indemnified against a claim by the true owner of the cargo, if it delivers the cargo with the knowledge that the party it is delivering to is not entitled thereto. Consequently, the indemnity agreement will be unenforceable on the grounds of illegality since the carrier acted fraudulently. In these circumstances, a carrier will not be indemnified against a misdelivery claim by the true owner of the cargo.

This analysis further indicates that the risk of non-enforceability of the letter of indemnity decreases where the contract of carriage expressly provides for the delivery of the cargo against a letter of indemnity if the bill of lading is not available. Furthermore, there are inherent risks associated with the use of standard letters of indemnity provided by P&I Clubs. Carriers need to be cautious of the terms contained in these standard letters of indemnity and ensure that they fully comply therewith otherwise the indemnification will not come into operation.

#### *7.2.3 Sub-research question No. 3:*

An examination of the relevant provisions of the Sea Transport Document Act 65 of 2000 (STDA) and the United Kingdom Carriage of Goods by Sea Act 1992 (UK COGSA 1992) indicates that there is some uncertainty regarding the rights of a bank as endorsee to sue the carrier for damages resulting from the misdelivery of cargo. In light of recent English case law, a bank can only be considered the lawful holder of the bill of lading in terms of the UK COGSA 1992 if it is the intention of both the transferor and transferee. Consequently, where a bank rejects the presentation of a bill of lading (on whatever grounds) it will not become the holder of the bill of lading since it lacks the required intention. In these circumstances, the bank will not have title to sue in terms of UK COGSA 1992 and this will seriously impair its security under a letter of credit agreement.

#### *7.2.4 Sub-research question No. 4:*

A brief examination of the nature of an electronic bill of lading indicates that an electronic bill of lading in itself is not capable of functioning as a transferable document of title. However, through the implementation of electronic systems such as blockchains, the concept of a transferable electronic bill of lading may be realised. Consequently, the presentation rule will eventually be replaced with an electronic version thereof, that is, an e-presentation. However,

this will only occur once these electronic systems are accepted and recognised by the shipping community and the necessary legal reforms are effected.

### 7.3 *Recommendations*

In light of the findings of this study, the following recommendations discussed below are aimed at providing short term and long term solutions to alleviate the legal consequences resulting from the non-adherence to the presentation rule and subsequent misdelivery of the cargo.

#### 7.3.1 *Recommendations for the short term*

Until a long term solution is established and implemented, it is recommended that the carrier takes the following precautionary measures to limit its liability:

(a) *Extending the applicability of The Hague-Visby Rules through contractual means:*

The parties to a contract of carriage may in terms of Article VII of The Hague-Visby Rules, extend the liabilities and responsibilities under the Rules. Therefore, it is recommended that an express term is included in the contract of carriage to extend the applicability of the Rules to post-discharge claims. The extension of the applicability of the Rules through contractual means will allow for the most important provision, namely the package limitation provision, to apply to claims for misdelivery. However, the other party to the contract of carriage might not be willing to include such a provision since the effect would be that a claim for misdelivered cargo will be limited to the amount set out in the package limitation provision.

(b) *Provision for the use of letters of indemnity in the contract of carriage:*

Likewise, in order to prevent the non-enforceability of a letter of indemnity, the carrier needs to ensure that the contract of carriage expressly provides for instances where the bill of lading is not available that the cargo may be delivered against a letter of indemnity. It is further recommended that a carrier only accepts a letter of indemnity that is countersigned by a financial institution such as a bank to ensure that it will be indemnified regardless of the financial standing of the indemnifier. This recommendation is quite costly since it may involve hefty bank fees and the indemnifier might be reluctant to oblige a carrier in this respect.



### 7.3.2 Recommendations for the long term<sup>3</sup>

An electronic means of transferring bills of lading is arguably the best alternative to the paper bill of lading and the practical problems associated with its use. One such electronic means is blockchain technology which as discussed in chapter 5, is capable of replicating the three functions of the paper bill of lading. The viability of a blockchain-based bill of lading system was tested by two companies last year.<sup>4</sup> The test rendered positive results and the ownership of the goods was successfully transferred during this trial run. Since the initial test, five separate pilot shipments and the use of five ‘Smart Bills of Lading’ have been completed and rendered the same results.<sup>5</sup>

The successful implementation of the blockchain-based systems holds many advantages for traders, especially carriers. The use of blockchain bills of lading will do away with the delayed arrival of bills of lading at the port of discharge which in turn will reduce the risk of a carrier being liable for demurrage or misdelivered cargo.<sup>6</sup> The other advantage of the use of blockchain bills of lading is that there are no membership subscriptions. This will benefit carriers since non-members may also use blockchain bills of lading.<sup>7</sup> In other words, a carrier will be able to use the blockchain bill of lading for all its clients since it is not restricted to parties who are registered members.

There are, however, disadvantages to the use of blockchain bills of lading which *inter alia* include a lack of international legal recognition and the non-recognition as security by banks.<sup>8</sup> The main obstacle preventing the shipping industry from recognising and fully embracing electronic systems to control and transfer bills of lading is the lack of legal certainty and the need for legal reform. The lack of legal recognition deters traders since a contract of carriage will not be regulated by a uniform set of rules, such as The Hague or Hague-Visby Rules. The non-recognition of the contract of carriage will expose the parties to the normal contractual remedies which are regulated by domestic laws which may be unfamiliar to the parties. Since the blockchain bill of lading is unregulated, banks have been reluctant to accept

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<sup>3</sup> The future recommendations suggested in this section is meant to set the way for future research.

<sup>4</sup> *World Maritime News* ‘Blockchain to retire Paper Bill of Lading’ 31 May 2019, available at <https://worldmaritimenews.com/archives/277832/blockchain-to-retire-paper-bill-of-lading/>, accessed on 15 December 2019; For a visual presentation of ‘how blockchain [technology] automates the flow of bills of lading’ see <https://trans.info/en/see-how-blockchain-automates-the-flow-of-bills-of-lading-138463>.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> K Takahashi ‘Blockchain technology and electronic bills of lading’ (2016) 22 *JIML* 205.

<sup>8</sup> Ibid at 206.

it as a valid form of security. Consequently, it will not be possible to secure financing for a sales transaction with a blockchain bill of lading.

Without the necessary legal reform on an international scale, the disadvantages of blockchain bills of lading outweigh the benefits thereof. It is submitted that it would be a mammoth task to amend the current international regimes regulating the use of paper bills of lading, namely The Hague and Hague-Visby Rules. Nonetheless, since the Rotterdam Rules are unlikely to receive the necessary support that The Hague and Hague-Visby Rules already enjoy it might be an easier task to amend The Hague and Hague-Visby Rules to provide for electronic bills of lading than convince countries to ratify the Rotterdam Rules.<sup>9</sup> Another option is for countries that are not signatories to the Rules to amend the legislation, that gives effect to The Hague or Hague-Visby Rules, to extend to the use of electronic bills of lading. From a South African perspective it would entail an amendment of the Carriage of Goods by Sea Act 1 of 1986.<sup>10</sup>

#### 7.4 Conclusion

Until the paper bill of lading is replaced with an electronic alternative the presentation rule will remain in effect and the practical problems caused by it will persist. Due to the practical problems created by the presentation rule, a carrier might be justified in delivering the cargo without the production of the bill of lading. Nonetheless, it is evident from this study that the non-adherence of the presentation rule will have severe legal consequences for both carriers and endorsees. Moreover, any measures to remedy the practical problems, such as the delivery against letters of indemnity, might have further unforeseen legal repercussions.

It is submitted that the presentation rule may be undesirable in certain circumstances, however, it is a well-established admiralty practice that serves a valuable purpose. Thus, it is pertinent that carriers are aware of the risks associated with the non-adherence to the rule and

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<sup>9</sup> The Hague-Visby Rules itself is an amendment of the Hague Rules which evidences that an amendment can be done and there is a good chance that it will be accepted by the shipping industry.

<sup>10</sup> For an example of how the legislation can be amended to include electronic bills of lading see appendix 1 of M Goldby 'Legislating to facilitate the use of electronic transferable records: A case study: Reforming the law to facilitate the use of electronic bills of lading in the United Kingdom', available at [https://www.uncitral.org/pdf/english/colloquia/EC/Legislating\\_to\\_facilitate\\_the\\_use\\_of\\_electronic\\_transferable\\_records\\_-\\_a\\_case\\_study\\_.pdf](https://www.uncitral.org/pdf/english/colloquia/EC/Legislating_to_facilitate_the_use_of_electronic_transferable_records_-_a_case_study_.pdf), accessed on 15 December 2019. This author suggests possible amendments to the English Carriage of Goods by Sea Act 1924 (English COGSA). It is submitted that since the English COGSA, as mentioned in chapter 1, is similar to the South African COGSA, the recommended amendments can be effected to the South African COGSA.

the practice of delivering against letters of indemnity. It is hoped that this study will provide carriers and endorsees with the necessary guidance to make informed decisions in this regard.

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-



Ms Chantelle Rousseau (218082593)  
School Of Law  
Howard College

Dear Ms Chantelle Rousseau,

**Protocol reference number:** 00003357

**Project title:** The Presentation of the Bill of Lading, a Necessary Evil: An examination of the legal implications of the misdelivery of cargo, owing to the non-presentation of the bill of lading, on the rights and duties of carriers and indorsees under South African and English law, and the Hague-Visby Rules.

## Exemption from Ethics Review

In response to your application received on 15 August 2019, your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW**.

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

### PLEASE NOTE:

Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,



Mr Simphiwe Peaceful Phungula  
Academic Leader Research  
School Of Law

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Website: <http://research.ukzn.ac.za/Research-Ethics/>

Founding Campuses: ■ Edgewood ■ Howard College ■ Medical School ■ Pietermaritzburg ■ Westville